No. 12309

United States
Court of Appeals
For the Ninth Circuit.

WIL-RUD CORPORATION,

Appellant.

vs.

E. A. LYNCH, Receiver and Trustee of the Estate of California Associated Products Co., AARON LEVINSON, VICTOR KRAMER, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, F. W. BOLTZ CORP., and LEO BRILL,

Appellees.

Transcript of Record

Appeals from the United States District Court, Southern District of California, Central Division.

FILED
DEC 22 1949
PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESS OF ATTORNEYS

For Appellant:

CHARLES J. KATZ,
1220 Garfield Bldg.,
403 W. 8th St.,
Los Angeles 14, Calif.

For Appellee: E. A. Lynch, Receiver and Trustee of the Estate of California Associated Products Co.:

CRAIG, WELLER & LAUGHARN,
111 West 7th St., Room 817,
Los Angeles 14, Calif.

For Appellee Aaron Levinson:

AARON LEVINSON,
715 Union Bank Bldg.,
Los Angeles 14, Calif.

For Appellee Victor Kramer:

HUGH W. LUTZ,
816 Pacific Southwest Bldg.,
Los Angeles 14, Calif.

For Appellee Bank of America, etc.:

JOHN E. WALTERS,
650 S. Spring St.,
Los Angeles 14, Calif.

For Appellee F. W. Boltz Corp.:

FRANK T. COTTER,
908 Quinby Bldg.,
Los Angeles 14, Calif.

For Appellee Leo Brill:

MAURICE M. GOODSTEIN,
739 S. Hope St.,
Los Angeles, Calif.

In the District Court of the United States, Southern District of California, Central Division

Number 45,137-BH

In the Matter of

CALIFORNIA ASSOCIATED PRODUCTS CO., a corporation, and also doing business as YANKEE DOODLE ROOT BEER BOTTLING COMPANY,

Debtor.

ORDER CONFIRMING AND APPROVING SALE

The debtor in the within proceeding having filed a petition seeking relief under the provisions of Chapter XI of the Bankruptcy Act, and having failed to submit for confirmation a plan of arrangement accepted by majority in number and amount of the unsecured creditors, and having announced through its counsel, Nat Rosin, that it had no objection to the sale as hereinafter set forth, and had no presently acceptable plan of arrangement to submit to the Court, and the matter of the submission of plans and of offers to purchase certain assets, hereinafter described, having been considered by this Court and the Creditors through the Committee of Creditors from time to time, and particularly at hearings held before this Court on September 25, 1947, October 7, 1947, and October 15, 1947, the Receiver, E. A. Lynch, being present and represented by Martin Gendel, of counsel, and the

Committee of Creditors being present in person, and the purchaser being represented by Charles J. Katz as his attorney, and it further appearing that the sale of the personal property hereinafter described is for the best interests of the within estate, and is made pursuant to the general powers conferred under the provisions of the Bankruptcy Act upon the undersigned as Referee, and is not made as any part of a plan or arrangement made or offered by or on behalf of the debtor, (all plans or arrangements having been rejected by the Court and the Committee of Creditors), and various bids having been submitted in open Court and the purchaser herein having been the highest and best bidder in open Court, and the Committee of Creditors being present in open Court and having given its consent hereto in open Court;

Now, Therefore, the undersigned Referee does hereby approve and confirm the sale by E. A. Lynch, as Receiver in the within estate, of certain personal property, hereinafter described, to Wil-Rud Corporation, a corporation, for a cash consideration to be paid to said E. A. Lynch, as Receiver, in the sum of $161,000.00, delivery of the assets to be made upon the signing of the within order, and payment therefor to be made concurrently with delivery to the buyer.

1. The Receiver, by this order, is deemed to have sold, and does sell to the buyer, all machinery, fixtures, equipment, all inventory, all lessee's improvements, all furnishings, all supplies, and all finished

and unfinished products of every class and character and description whatsoever located at 3631 Union Pacific Avenue, Los Angeles, California, together with all the other physical assets of the debtor corporation, wheresoever situated, and together with all of the physical assets of every class and character of the Yankee Doodle Root Beer Company, a corporation, as of October 15, 1947, at 5:00 o'clock P.M.; all of said items are sold free and clear of any liens, charges, and encumbrances, save and except a balance owing on a sales contract to the Los Angeles Water Softener Company in the sum of $1,699.17, which balance the purchaser assumes and agrees to pay.

2. By this order the Receiver does transfer to the buyer all right, title and interest which this estate has in and to the lease covering the premises occupied by the debtor at 3631 Union Pacific Avenue, Los Angeles, California with the further provision that if Lowell E. Thompson and/or William F. Greene now have, or shall have, any arrangement or understanding, express or implied, with the owner of said premises for the obtaining of a lease upon said premises, or any extension thereof, that then such right shall inure to the benefit of the purchaser hereof, and with the further provision that the Court will make such orders as may be necessary to cause said Lowell E. Thompson and/or William F. Greene to transfer and assign unto the purchaser all such arrangements or understandings.

3. By this order there shall be transferred to

the purchaser, and the Receiver does hereby transfer to the purchaser, all of the issued and outstanding shares of the capital stock of the Yankee Doodle Root Beer Company, a corporation.

4. By this order there shall be and hereby is conveyed and transferred to the purchaser all ownership, right, title and interest which this estate has, or may have, or claims to have in and to any patents, processes, formulae, good will, copyright, trade names, trade marks, royalties, and/or licensing agreements, whether in the name of the debtor herein, towit, California Associated Products Co., or Yankee Doodle Root Beer Bottling Company, or Yankee Doodle Root Beer Company, a corporation, which by way of specification, and not by way of limitation, shall and does include the particular and specific formula or formulae, or process or processes for the concentrate used in the manufacture of the root beer known as Yankee Doodle Root Beer and manufactured and sold by California Associated Products Co., the debtor herein, or Yankee Doodle Root Beer Bottling Co., or Yankee Doodle Root Beer Co., a corporation, or any of them.

5. The estate and the receiver herein are not transferring or selling to the aforesaid purchaser any of the following items: any interest in and to choses in action existing on behalf of the estate; cash in the possession of the receiver as of the close of business on October 15, 1947; accounts receivable created by the debtor prior to the commencement of

the reorganization proceedings; accounts receivable created by the receiver since the commencement of the reorganization proceedings, and to and including the 15th day of October, 1947; that certain promissory note of Loma Linda Food Company and the Yankee Doodle Root Beer Company, upon which a balance of approximately $4,300.00 is now owing; any claims for the cash surrender value of life insurance upon Messrs. Thompson and Greene arising from payment of premiums by debtor; or any of the insurance policies covering the physical assets transferred herein or issued to, or standing in the name of California Associated Products Co., the debtor herein, or Yankee Doodle Root Beer Bottling Co., or Yankee Doodle Root Beer Co., a corporation, or any of them, or in or to any of the unexpired premiums of the same or any part thereof; or any rights on behalf of the within estate to the items pledged as security by the debtor with the Bank of America National Trust & Savings Association, Monarch Wine Company and Raisin Syrup Company.

Dated: October 22, 1947.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

Approved:

CHARLES J. KATZ,
By /s/ SAMUEL W. BLUM,
As Counsel for Wil-Rud Corporation.

[Endorsed]: Filed Oct. 22, 1947.

[Title of District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE RE: WIL-RUD CORPORATION SALE

To the Honorable Hugh L. Dickson, Referee in Bankruptcy:

Comes now your petitioner E. A. Lynch, and respectfully represents as follows:

I.

That he is the duly appointed, qualified and acting Receiver in the within proceedings.

II.

That heretofore an order confirming and approving a sale to Wil-Rud Corporation was made and signed on the 22nd day of October, 1947; in substance, among other things, said order provided in paragraph 1 thereof that the physical assets of the debtor corporation and of Yankee Doodle Root Beer Bottling Company, a subsidiary corporation, were sold to Wil-Rud Corporation as of October 15, 1947, at 5 o'clock p.m.

III.

That said order confirming and approving sale provided for the sum of $161,000.00 to be paid upon the signing of said order, and to date, no sum, save and except the sum of $100,000.00 has been paid to your petitioner, and the balance in the sum of $61,000.00 is now due, owing and unpaid; that your petitioner has been informed by Wil-Rud Corporation that it desires adjustments on the basis that

pursuant to an inventory prepared by your petitioner, certain items of personal property are now claimed by said purchaser to be missing, in the gross sum of $15,488.99, and that there are certain errors in addition on the inventory, totalling $3,463.17, making a total difference claimed of $18,952.16.

IV.

That your petitioner is informed and believes, and therefor alleges, that the physical assets of the debtor as of 5 o'clock p.m., October 15, 1947, and pursuant to the order confirming and approving sale, have all been tendered to the purchasing corporation, and that all things to be performed by your petitioner to conclude said sale have been performed, and the said $61,000.00 is now due and payable to your petitioner without any allowance of offsets on behalf of said Wil-Rud Corporation; that the sale to the said Wil-Rud Corporation was not predicated upon any inventory either as to items or additions; that said sale was made solely in accordance with the order confirming and approving sale.

Wherefore, your petitioner prays that this court make an order directing Wil-Rud Corporation to show cause why the said $61,000.00 should not be forthwith paid.

/s/ E. A. LYNCH,
Petitioner.
GENDEL & CHICHESTER,
By /s/ MARTIN GENDEL,
of Counsel for Petitioner.

State of California,
County of Los Angeles—ss.

E. A. Lynch being by me first duly sworn, deposes and says: that he is the Petitioner in the above entitled action; that he has read the foregoing Petition for Order to Show Cause Re: Wil-Rud Corporation Sale and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters he believes it to be true.

/s/ E. A. LYNCH.

Subscribed and sworn to before me this 31 day of October, 1947.

[Seal] /s/ M. E. MANUAL,
Notary Public in and for said County and State of California.

[Endorsed]: Filed Oct. 31, 1947.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE RE: WIL-RUD CORPORATION SALE

To Wil-Rud Corporation, a corporation, and to Charles J. Katz, its attorney:

You and Each Of You Will Please Take Notice, that pursuant to the petition of E. A. Lynch, dated October 31, 1947, a copy of which is attached hereto, the Wil-Rud Corporation is directed to appear be-

fore the undersigned Referee, in his courtroom located on the 3rd floor of the Federal Building, Los Angeles, California, on the 7th day of November, 1947, at the hour of 10 A.M., then and there to show cause why the petition as prayed for should not be granted, and why the said Wil-Rud Corporation should not be forthwith directed to pay the sum of $61,000.00.

The Within Order To Show Cause, and petition attached hereto, may be served by delivering or mailing same to the office of Charles J. Katz on or before the 1st day of November, 1947.

Dated this 31st day of Oct., 1947.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed]: Filed Oct. 31, 1947.

[Title of District Court and Cause.]

PETITION FOR LEAVE TO COMPROMISE RE: WIL-RUD CORPORATION SALE

To the Honorable Hugh L. Dickson, Referee in Bankruptcy:

Comes now your petitioner, E. A. Lynch, and respectfully represents as follows:

I.

That he is the duly appointed, qualified and acting receiver in the within reorganization proceedings.

II.

That heretofore, and on or about the 15th day of October, 1947, Wil-Rud Corporation purchased certain assets of the debtor corporation at a sale held in open court; that the purchase price was the sum of $161,000.00; that since said 15th day of October, 1947, certain differences have arisen between the said purchaser and your petitioner, which differences can be summarized somewhat as follows:

(a) The purchaser contended that it bought all of those physical assets reflected by that certain inventory filed in the within debtor proceedings, which inventory is designated as "Respondent's Exhibit No. 2" introduced at the hearing on the petition of the receiver for an order to show cause directed against the purchaser, held before this Court on the 7th day of November 1947; that during said proceedings Wil-Rud Corporation contended that it

was entitled to an adjustment on inventory shortages in the sum of $19,336.86; thereafter, Wil-Rud Corporation presented their contentions, particularly in connection with page 88-a of said inventory, wherein there was itemized a total of approximately $47,976.29 worth of root beer bottles and cases, alleged to be in the vicinity or territory of Los Angeles, California, and, in connection therewith, Wil-Rud Corporation alleges that the debtor has taken deposits of 60c per case, and that said deposits are reflected by the fact that each of the customers having possession of the cases and bottles therein have a lien by virtue of the possession thereof until the said 60c is repaid; in addition thereto, the purchaser has alleged other variances and claims in connection with the sale, contending that it has paid certain warehousing and other charges on items which were purportedly sold free and clear.

(b) That it is the contention of your petitioner that the assets were sold "where is, as is" as of October 15, 1947, but your petitioner does allege that there is merit to the claims of the purchaser, particularly since the issues as to the inventory shortages were submitted to this Court on the 7th day of November, 1947, and this Court has indicated that it would determine the matter in favor of the purchaser.

III.

That after a full and complete interchange of facts, your petitioner and his counsel have conferred with the purchaser and its counsel in an effort to

determine whether or not a compromise and settlement could be reached so that the administration of the within estate could be brought to a termination; that after negotiations and conferences, the following compromise and settlement has been offered by the purchaser, and is now being recommended to this Court by your petitioner as apparently being for the best interests of the within estate, subject to the approval of this Court:

1. The purchaser is to be allowed a credit upon the purchase price herein in the sum of $18,500.00 making the total purchase price payable in the sum of $142,500, less a credit of $125,000, heretofore paid, leaving a present balance now due and payable, and to be paid upon the approval of the within petition for leave to compromise, in the sum of $17,500.00.

2. The purchaser does, concurrently herewith, make an offer to purchase all outstanding accounts receivable of the within estate, as per that certain itemization approved by the purchaser and the receiver on December 22, 1947, and specifically excluding therefrom the accounts receivable wihch the estate now has with Messrs. Thompson, Green, Tanner & Harold Brooks, and likewise excluding therefrom the accounts receivable owing to the estate from California Marmalade Company, Pacific Associated Products Company, and Loma Linda; said offer of purchase is in the sum of $3,500.00, and the purchaser, in connection therewith, agrees to hold your petitioner harmless on any claims for refunds

on cases and/or bottles up to 60c per wooden case containing 24 bottles, for each such case and/or bottles surrendered up to purchaser.

3. The purchaser will declare compromised and settled in full any and all claims of any nature against the within estate, or the receiver herein, arising from the aforesaid sale, and the receiver will likewise declare compromised and settled any and all claims of any nature arising on behalf of the within estate, or the receiver, as against the purchaser, save and except for the performance of the items contained in paragraphs 1 and 2 hereinabove.

Wherefore, your petitioner prays that after due notice to creditors a hearing be held and that the within petition for leave to compromise be approved.

Dated: December 26, 1947.

/s/ E. A. LYNCH,
Receiver,
Petitioner.

GENDEL & CHICHESTER,
By /s/ MARTIN GENDEL,
of counsel for receiver.

Approved:

/s/ CHARLES J. KATZ,
Attorney for Wil-Rud
Corporation.

State of California,
County of Los Angeles—ss.

E. A. Lynch being by me first duly sworn, deposes and says: that he is the petitioner in the above

action; that he has read the foregoing Petition For Leave To Compromise Re: Wil-Rud Corporation Sale, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are there stated upon information or belief, and as to those matters he believes it to be true.

/s/ E. A. LYNCH.

Subscribed and sworn to before me this 31st day of December, 1947.

[Seal] /s/ DORIS E. EDWARDS,
Notary Public in and for said County and State of California.
My Commission Expires Sept. 17, 1950.

[Endorsed]: Filed Jan. 6, 1948.

[Title of District Court and Cause.]

NOTICE OF HEARING ON PETITION TO COMPROMISE AND SALE OF ACCOUNTS RECEIVABLE

To the Creditors of the above named Debtor Estate:

Notice Is Hereby Given that on January 29, 1948 at 10:00 A.M. at the courtroom of the undersigned Referee in Bankruptcy, 339 Federal Building, Temple and Spring Streets, Los Angeles, California, a meeting of creditors will be held to hear the petition of E. A. Lynch, the Receiver herein, to compromise the following:

That heretofore, and on or about the 15th day of October, 1947, Wil-Rud Corporation purchased certain assets of the debtor corporation at a sale held in open court; that the purchase price was the sum of $161,000.00; that since said 15th day of October, 1947, certain differences have arisen between the said purchaser, the Wil-Rud Corporation, and the Receiver;

(a) The Wil-Rud Corporation contended that it bought all of those physical assets reflected by that certain inventory filed in the within debtor proceedings, which inventory is designated as "Respondent's Exhibit No. 2" introduced at the hearing on the petition of the receiver for an order to show cause directed against the Wil-Rud Corporation, held before the Court on the 7th day of November, 1947; that during said proceedings Wil-Rud Corporation contended that it was entitled to an adjustment on inventory shortages in the sum of $19,336.86; thereafter, Wil-Rud Corporation presented their contentions, particularly in connection with page 88-a of said inventory, wherein there was itemized a total of approximately $47,976.29 worth of root beer bottles and cases, alleged to be in the vicinity of territory of Los Angeles, California, and, in connection therewith Wil-Rud Corporation alleges that the debtor has taken deposits of 60c per case, and that said deposits are reflected by the fact that each of the customers having possession of the cases and bottles therein have a lien by virtue of the possession thereof until the said 60c is repaid; in

addition thereto, the Wil-Rud Corporation has alleged other variances and claims in connection with the sale contending that it has paid certain ware-housing and other charges on items which were purportedly sold free and clear.

(b) That it is the contention of the Receiver that the assets were sold "where is, as is" as of October 15, 1947, but the Receiver does allege that there is merit to the claims of the Wil-Rud Corporation, particularly since the issues as to the inventory shortages were submitted to this Court on the 7th day of November, 1947, and this Court has indicated that it would determine the matter in favor of the Wil-Rud Corporation.

The Wil-Rud Corporation has offered the following compromise:

The Wil-Rud Corporation is to be allowed a credit upon the purchase price herein in the sum of $18,500.00 making the total purchase price payable in the sum of $142,500, less a credit of $125,000, heretofore paid, leaving a present balance now due and payable, and to be paid upon the approval of the within petition for leave to compromise, in the sum of $17,500.00.

2. The Wil-Rud Corporation offers to purchase for the sum of $3,500.00 all outstanding accounts receivable of the within estate, as per that certain itemization approved by the Wil-Rud Corporation and the Receiver on December 22, 1947 with the following exceptions:

Accounts with Messrs. Thompson, Green, Tanner and Harold Brooks and the accounts receivable owing to the estate from the California Marmalade Company, Pacific Associated Products Company and Loma Linda;

The Wil-Rud Corporation agrees to hold the Receiver harmless on any claims for refunds on cases and/or bottles up to 60c per wooden case containing 24 bottles, for each such case and/or bottles surrendered up to the Wil-Rud Corporation.

The Wil-Rud Corporation will declare compromised and settled in full any and all claims of any nature against the within estate, or the Receiver herein, arising from the aforesaid sale, and the Receiver will likewise declare compromised and settled any and all claims of any nature arising on behalf of the within estate, or the Receiver, as against the Wil-Rud Corporation, save and except for the performance of the items contained in the above paragraphs.

The Receiver believes that it is to the best interests of said estate that said compromise be approved.

For further information, see petition on file in the office of the undersigned Referee in Bankruptcy.

HUGH L. DICKSON,
Referee in Bankruptcy.

Dated: January 14, 1948.

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW, and ORDER APPROVING PETITION FOR LEAVE TO COMPROMISE WIL-RUD CORPORATION SALE

Pursuant to the verified petition of E. A. Lynch, as receiver in the within Chapter XI, proceedings, dated January 6, 1948, seeking leave to compromise claims made by Wil-Rud Corporation, and after duly noticing same, in writing, to all creditors as required by law, a hearing was held before the undersigned Referee, in his courtroom located on the 3rd floor of the Federal Building, Los Angeles, California, on January 29, 1948, at the hour of 10 a.m.; at said hearing E. A. Lynch, the Receiver, was present and represented by Martin Gendel, of counsel, and the purchaser, Wil-Rud Corporation was present, and represented by its counsel, Chas. J. Katz, and the various creditors and their representatives were present, particularly those creditors represented by attorneys Frank T. Cotter, Hugh Ward Lutz, Aaron Levinson and Hugo Steinmeyer; after evidence, both oral and documentary, was duly introduced, and the objections of various creditors and the recommendations of the Receiver were considered, and after the arguments of counsel were duly submitted, and good cause appearing therefor, the undersigned Referee does hereby make the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. The undersigned Referee finds that the allegations contained in paragraphs I and II of the petition of E. A. Lynch, above referred to and dated January 6, 1948, for leave to compromise problems involved in the Wil-Rud Corporation sale, are true.

2. The undersigned Referee further finds that the Wil-Rud Corporation could reasonably contend that it was entitled to total adjustments in the sum of approximately $28,000.00, and without passing further on the merits of said claims at this time, the undersigned Referee finds it would be for the best interests of the within estate to permit the compromise and settlement of the pending litigation and further claims on the basis of allowing a reduction of the purchase price in the sum of $18,500.00, thereby reducing the purchase price to the sum of $142,500.00, leaving a present balance due and payable, upon the signing of this Order in the sum of $17,500.00; the purchaser, Wil-Rud Corporation having heretofore paid to the Receiver, E. A. Lynch, the sum of $125,000.00 on account of the purchase price. It further appears that some of the creditors now objecting to the compromise submitted and approved a bid of $135,000.00 to this Court on October 15, 1947, and requested this Court not to accept any higher bid; the undersigned Referee further finds that on November 7, 1947, this Court considered some of the claims of Wil-Rud Corporation concerning alleged shortages, and in-

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW, and ORDER APPROVING PETITION FOR LEAVE TO COMPROMISE WIL-RUD CORPORATION SALE

Pursuant to the verified petition of E. A. Lynch, as receiver in the within Chapter XI, proceedings, dated January 6, 1948, seeking leave to compromise claims made by Wil-Rud Corporation, and after duly noticing same, in writing, to all creditors as required by law, a hearing was held before the undersigned Referee, in his courtroom located on the 3rd floor of the Federal Building, Los Angeles, California, on January 29, 1948, at the hour of 10 a.m.; at said hearing E. A. Lynch, the Receiver, was present and represented by Martin Gendel, of counsel, and the purchaser, Wil-Rud Corporation was present, and represented by its counsel, Chas. J. Katz, and the various creditors and their representatives were present, particularly those creditors represented by attorneys Frank T. Cotter, Hugh Ward Lutz, Aaron Levinson and Hugo Steinmeyer; after evidence, both oral and documentary, was duly introduced, and the objections of various creditors and the recommendations of the Receiver were considered, and after the arguments of counsel were duly submitted, and good cause appearing therefor, the undersigned Referee does hereby make the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. The undersigned Referee finds that the allegations contained in paragraphs I and II of the petition of E. A. Lynch, above referred to and dated January 6, 1948, for leave to compromise problems involved in the Wil-Rud Corporation sale, are true.

2. The undersigned Referee further finds that the Wil-Rud Corporation could reasonably contend that it was entitled to total adjustments in the sum of approximately $28,000.00, and without passing further on the merits of said claims at this time, the undersigned Referee finds it would be for the best interests of the within estate to permit the compromise and settlement of the pending litigation and further claims on the basis of allowing a reduction of the purchase price in the sum of $18,500.00, thereby reducing the purchase price to the sum of $142,500.00, leaving a present balance due and payable, upon the signing of this Order in the sum of $17,500.00; the purchaser, Wil-Rud Corporation having heretofore paid to the Receiver, E. A. Lynch, the sum of $125,000.00 on account of the purchase price. It further appears that some of the creditors now objecting to the compromise submitted and approved a bid of $135,000.00 to this Court on October 15, 1947, and requested this Court not to accept any higher bid; the undersigned Referee further finds that on November 7, 1947, this Court considered some of the claims of Wil-Rud Corporation concerning alleged shortages, and in-

dicated from the Bench that it appeared that the said purchaser had relied on the inventory prepared in this estate, and, therefore, was entitled to pro-rata credits for alleged shortages in that inventory.

3. The undersigned Referee further finds that as a part of the compromise and settlement, the purchaser, Wil-Rud Corporation, is to hold E. A. Lynch, as Receiver of this estate, harmless for any refunds on cases and/or bottles up to 60c per wooden case containing 24 bottles, and each case and/or bottle surrendered up to Wil-Rud Corporation.

4. The undersigned Referee further finds that upon the payment of the sum of $17,500.00 to the within estate, all claims by Wil-Rud Corporation, of any nature against the within estate, or E. A. Lynch, as Receiver, arising from the sale of Wil-Rud Corporation will be deemed compromised and settled in full, and likewise, the claims of the Receiver on behalf of this estate as against the Wil-Rud Corporation will be deemed compromised and settled in full, save and except for the payment of $17,500.00, and the agreement of Wil-Rud Corporation to hold the estate and E. A. Lynch, as Receiver, harmless from claims for refunds on cases and/or bottles surrendered to the corporation by the holders thereof.

5. The undersigned Referee does further find it would be an unwise expense upon the part of the within estate to attempt to direct the Receiver to quiet title to all of the many hundreds of retailers

with whom the debtor corporation has realt in order to be able to surrender the wooden cases involved in the within settlement to Wil-Rud Corporation free and clear of any claims, and that it would be cheaper for the debtor corporation and the Receiver to complete the proposed compromise and settlement rather than to attempt to deliver approximately 25,000 cases free and clear of claims pursuant to the representations contained on page 88-a of the inventory described in paragraph II of the petition for leave to compromise.

6. The undersigned Referee further finds that it is not for the best interests of the within estate to approve the proposed sale of the accounts receivable in the sum of $3,500.00 to Wil-Rud Corporation, and by separate order is disapproving said sale and does find that it should not be made any part of the within approved compromise and settlement.

Conclusions of Law

From the above Findings of Fact, the undersigned Referee concludes:

A. That it would be for the best interests of the within estate to approve the compromise and settlement as heretofore submitted, save and except for the sale of the accounts receivable to Wil-Rud Corporation; and

B. The undersigned Referee further concludes that the objections to the proposed compromise and

settlement are not well taken and should not be sustained.

Order

Now, Therefore, based upon the Findings of Fact and Conclusions of Law, it is hereby Ordered:

1. That the petition of E. A. Lynch to compromise and settle the claims involved in the sale to Wil-Rud Corporation entered on October 22, 1947, be and the same is hereby approved.

2. That Wil-Rud Corporation is ordered to pay to E. A. Lynch, as Receiver of the within estate, the sum of $17,500.00.

3. That Wil-Rud Corporation is ordered to hold E. A. Lynch, as Receiver, and the within estate, harmless from any claims for refunds on cases and/or bottles, up to 60c per wooden case for each such case or bottles surrendered to Wil-Rud Corporation.

Dated this 26th day of February, 1948.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

Approved As To Form and Contents:

/s/ CHARLES J. KATZ,
Attorney for Wil-Rud Corporation.

Received Feb. 13, 1948.

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S ORDER DATED FEBRUARY 26, 1948, BY JUDGE

To Hugh L. Dickson, Referee in Bankruptcy:

The petition of Aaron Levinson, Bank of America, National Trust & Savings Association, Leo Brill, F. W. Boltz, Corp., a California corporation, and Victor Kremer, respectfully presents:

I.

That each of them is a creditor of the above named Debtor and that the aggregate amount of their claims is in excess of $200,000.00, and approximately one-half of the total unsecured claims of said Debtor.

II.

That each of them appeared before this Court on January 29, 1948, at the hearing on the petition of the Receiver herein seeking leave to compromise the claims being asserted by Wil-Rud Corporation.

III.

That the Receiver herein filed a petition dated January 6, 1948, entitled "Petition for Leave to Compromise re Wil-Rud Corporation Sale" wherein said Receiver prayed that said petition for leave to compromise be approved.

IV.

That on February 26, 1948, an order was entered

granting the prayer of said petition in the words and figures as follows:

"1. That the petition of E. A. Lynch to compromise and settle the claims involved in the sale to Wil-Rud Corporation entered on October 22, 1947, be and the same is hereby approved.

2. That Wil-Rud Corporation is ordered to pay to E. A. Lynch, as Receiver of the within estate, the sum of $17,500.00.

3. That Wil-Rud Corporation is ordered to hold E. A. Lynch, as Receiver, and the within estate, harmless from any claims for refunds on cases and/or bottles, up to 60c per wooden case for each such case of bottles surrendered to Wil-Rud Corporation."

V.

The said order is erroneous for the following reasons:

(a) That neither the Receiver herein nor the Referee gave to the creditors in the notice to creditors or otherwise any information as to what are the claims of said Wil-Rud Corporation, and how said Wil-Rud Corporation arrived at the amount of its claims; and what are the shortages claimed by said Corporation and how it arrived at the amounts of said shortages, and said Wil-Rud Corporation has never reduced its claims to writing or filed them in this proceeding.

(b) That nowhere in these proceedings or the notice to creditors does it appear what the shortages are or upon which Wil-Rud bases its conten-

tion that it is entitled to an "adjustment on inventory shortages in the sum of $19,336.80."

(c) That any claim of Wil-Rud Corporation based on inventory shortages is without merit by reason of order of this Court confirming the sale to said Wil-Rud Corporation dated October 22, 1947, approved by said corporation, ordering the transfer to Wil-Rud Corporation of all right, title and interest of this estate of all machinery, etc., located at 3631 Union Pacific Avenue, Los Angeles, California, together with all other physical assets of the debtor corporation "wheresoever situated . . . as of October 15, 1947, at 5:00 o'clock P.M."

(d) That any claim of Wil-Rud Corporation based on an assertion that the Debtor's customers who deposited 60c with the Debtor have a lien to that extent on each wooden case in the customer's possession is without merit.

(e) That the claim of Wil-Rud Corporation based on such alleged lien of 60c on each outstanding wooden case is as to the total amount of such claim merely a guess and the conjecture of said corporation; that nowhere does the number of such claims nor the amount thereof appear, nor does it appear any customer has asserted such a claim.

(f) That it does not appear from the record herein how the Receiver arrived at the amount of $18,500.00 which he desires to allow said Wil-Rud Corporation.

(g) That there was no substantial evidence in-

troduced at the hearing on the petition to compromise upon which either the Court or the creditors could determine the merits or demerits of the petition to compromise.

(h) That the merits of the claims of said Wil-Rud Corporation should have been determined before the order approving the compromise was made.

(i) That no substantial evidence was offered upon which an order could be based that the approval of the proposed compromise was to the best interests of the creditors.

Wherefore, your petitioners pray for a review of the said order by the judge, and that the said order be vacated and set aside.

Dated: March 4th, 1948.

/s/ AARON LEVINSON,
In Pro Per.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION,
By /s/ E. M. BERRY,
Its Attorney.

LEO BRILL,
By /s/ MAURICE M. GOODSTEIN,
His Attorney.

F. W. BOLTZ CORP., a California Corporation,
By /s/ FRANK T. COTTER,
Its Attorney.

VICTOR KREMER,
By /s/ HUGH WARD LUTZ,
His Attorney.

[Endorsed]: Filed Mar. 8, 1948.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable Ben Harrison, Judge of the United States District Court, for the Southern District of California, Central Division:

I, Hugh L. Dickson, Referee in Bankruptcy, to whom the above entitled matter has been referred, do hereby certify as follows:

That E. A. Lynch was duly appointed and qualified as receiver in the within Chapter XI reorganization proceedings, and pursuant to said order of appointment he took possession and continued the operations of the business being conducted by the debtor prior to the filing of the petition for the plan of arrangement, consisting primarily of the bottling of root beer and the sale of root beer extract; the major portion of the physical assets involved were located at the main bottling plant, 3631 Union Pacific Avenue, Los Angeles, California; that in the administration of the within estate it became advisable for the receiver to attempt to sell the assets of the estate; after due notice to creditors, hearings were held before this Court on September 25, October 7 and October 15, 1947.

On the 15th day of October, 1947, Mr. Aaron Levinson, on behalf of Mr. C. Ray Miller, read to the Court an offer of $135,000.00 for the assets of the debtor corporation and requested the Court to accept this offer and not to permit competitive bid-

ding for the assets; that said attorney purported to submit the said offer, and the request that the offer be approved, on behalf of all of the members of the Committee of Creditors; that included upon said Committee of Creditors are the following creditors, now petitioning this Court for the review of the order in question:

Aaron Levinson.

Bank of America National Trust and Savings Association.

F. W. Boltz Corporation.

After your Referee opened the matter for competitive bidding, Wil-Rud Corporation, nominee of Samuel Rudolph, was adjudged the highest and best bidder, having offered $161,000.00 cash for the assets.

That on October 22, 1947, this Referee signed an order confirming and approving sale of the assets to Wil-Rud Corporation; that pursuant to said order possession of the assets was turned over to the purchaser, Wil-Rud Corporation, and, thereafter, a dispute developed between E. A. Lynch, as receiver, and the said purchaser; that pursuant to a verified petition by said receiver an order to show cause was duly issued and served upon Wil-Rud Corporation directing said corporation to appear before this Referee on November 7, 1947, to show cause why the balance of the purchase price should not be forthwith paid; that at that time Wil-Rud Corporation had paid $100,000.00 toward the pur-

chase price and there remained due and owing $61,-000.00; the Committee of Creditors had been duly informed of the order to show cause and there were present at the hearing Aaron Levinson and C. Ray Miller; from the evidence presented it appeared to this Referee that Wil-Rud Corporation had submitted its bid in reliance upon the inventory admittedly shown to Samuel Rudolph, its representative; that at said hearing held on November 7, 1947, Exhibit #1 was introduced, reflecting claimed inventory shortages totalling a gross amount of $18,-952.16; that Exhibit #2 introduced at said hearing is the inventory itself, allegedly relied upon by the purchaser in making its bid; that at said hearing this Referee indicated that he would rule that the purchase was made pursuant to the inventory, and that a pro-rate allowance would be made to the bidder on the basis of the total value of the inventory as against the inventory shortages, which would mean a reduction of approximately 40% of $18,-952.16; that at the said hearing on November 7, 1947, there was brought to the attention of this Court the fact that the purchaser was likewise contending for an adjustment involving wooden cases and bottles used by the debtor in the sale and delivery of its root beer product.

Thereafter a petition was filed by the receiver herein to compromise the claims of Wil-Rud Corporation centering upon two problems:

1. The inventory shortages covered in the hear-

ing above described, held on November 7, 1947, involving 40% of items totalling $18,952.16; and,

2. A contention by the purchaser that the items contained on page 88(a) of the above referred to inventory could not be delivered free and clear to the purchaser for the reason that retail distributors had possession of the wooden cases and bottles involved and had paid 60c per case as a deposit thereon, and, therefore had a lien for said amount of 60c per case predicated on their possession of the cases; that the gross amount involved in the value of the cases and bottles referred to was $47,976.29 (if this gross figure were recognized then 40% thereof would be the prorated deduction allowable to the purchaser); on the other hand, 25807 wooden cases were involved, and if the estate were required to pay 60c per case in order to clear any claim of lien as against the cases (described on page 88(a) of the inventory as "wood shells"), the total amount involved would be $15,484.20.

That after due written notice to all creditors and interested parties a hearing was held upon the petition of the receiver to compromise the said two specific claims, and any and all other claims which Wil-Rud Corporation might have as against the within estate, on the basis that an $18,500.00 reduction would be allowed in the total purchase price, making the net amount payable to the estate $142,500.00, and, $25,000.00 having been paid in addition to the original payment of $100,000.00, the balance then due and owing would be the sum of $17,500.00;

in addition thereto, Wil-Rud Corporation agreed to hold the receiver harmless from any claims for refunds arising from any attempts to return wooden cases by distributors with whom the receiver had dealt during his operation of the assets of this estate; that the hearing on said petition for leave to compromise was held before this court on January 29, 1948; that included at said hearing was a petition to sell outstanding accounts receivable to Wil-Rud Corporation, but, after a consideration of the facts involved at the time of said hearing, this Referee denied the petition to sell and directed the receiver to make his own collections thereon.

That on the 29th day of January, 1948, this Referee took the testimony of certain witnesses, to-wit, Ralph J. Yates, the accountant employed by E. A. Lynch as receiver, and, the testimony of Wolf Wilder and Samuel Rudolph as agents of the purchaser Wil-Rud Corporation; after considering the facts and arguments as submitted by counsel for the receiver, and the purchaser, and after considering the objections of various creditors, primarily those represented by the petitioners now on review, this Referee determined that it would be for the best interests of the within estate to approve the petition for leave to compromise.

This Referee was convinced that the purchaser had relied upon the written inventory handed to its agents in preparation for bidding upon the assets, as hereinabove recited in connection with the hearing held on November 7, 1947; this Referee further

was convinced that the physical assets owned by the corporation were sold free and clear to the purchaser, and there was a strong possibility that the receiver could not deliver clear title to the wooden cases and bottles involved without compensating the distributors to the extent of at least 60c per wooden case, since the distributors had possession of the cases and appeared to be entitled to claim a lien thereon until the 60c deposit had been returned; in addition thereto there was involved the practical problem of quieting title to many thousands of wooden cases located in the hands of several thousand vendees; under all of the circumstances, considering the legal and equitable problems involved, including the possibility of an adverse ruling on both items as against the receiver in the event of contested litigation with the purchaser, and the expense of such litigation, this Referee ordered the proposed compromise with Wil-Rud Corporation approved, and executed findings of fact, conclusions of law, and an order thereon, dated February 26, 1948.

That no order was sought or obtained by the present petitioners for review authorizing the filing of a petition for review of the order of this Court, although they were not parties to the petition to compromise the differences between the receiver herein and Wil-Rud Corporation, the purchaser.

This Referee proceeded pursuant to Section 27 of the Bankruptcy Act (U.S. Code, Title XI, Chapter 4, Section 50) governing compromises and reading as follows:

"The receiver or trustee may, with the approval of the Court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate." The procedure adopted by the receiver appeared to be in compliance with the General Orders governing bankruptcy proceedings, particularly Numbers 28 and 33; the sole question which this Referee believes is presented on the petition for review is whether or not this Referee abused his discretion in determining that approval of the petition for leave to compromise was for the best interests of this estate.

In compliance with the provisions of Section 39-a (8), I attach to this certificate the following:

1. The Reporter's Transcript Of Proceedings held on October 15, 1947, in re hearing on plan for sale of property;

2. The Order Confirming and Approving Sale Of Property To Wil-Rud Corporation, dated October 22, 1947;

3. The Petition Of E. A. Lynch As Receiver For Order To Show Cause, directed against Wil-Rud Corporation for the payment of the balance of the purchase price of $161,000.00;

4. The Order To Show Cause against Wil-Rud Corporation issued by this Court on October 31, 1947;

5. The Reporter's Transcript of the hearing held on November 7, 1947, on the aforesaid order to show cause;

6. Petitioner's Exhibit No. 1, containing an itemization of alleged inventory shortages (introduced in evidence on November 7, 1947);

7. Petitioner's Exhibit No. 2, being the written inventory of the assets of the debtor (introduced in evidence on November 7, 1947);

8. Petition Of E. A. Lynch As Receiver, dated January 6, 1948, for leave to compromise claims of Wil-Rud Corporation;

9. Notice Of Hearing On Petition To Compromise, dated January 14, 1948;

10. Reporter's Transcript of hearing held on January 29, 1948, re petition to compromise;

11. Findings Of Fact, Conclusions Of Law and Order, dated February 26, 1948, approving petition for leave to compromise the Wil-Rud Corporation sale.

12. Petition dated March 4, 1948, For Review Of The Referee's Order, dated February 26, 1948, filed by various creditors.

Dated this 24th day of March, 1948.

Respectfully submitted,

/s/ HUGH L. DICKSON,

Referee in Bankruptcy.

[Endorsed]: Filed April 13, 1948.

At a stated term, to wit: The September Term. A. D. 1948, of the District Court of the United States of America, within and for the Central

Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 16th day of December in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable: Ben Harrison,
District Judge.

[Title of Cause.]

Memorandum Opinion reversing the order of the Referee on the Petition for Review of Aaron Levinson, Bank of America, Leo Brill, F. W. Boltz Corp., and Victor Kremer is signed and ordered filed in the above-entitled proceedings. Filed Memorandum of Opinion.

[Title of District Court and Cause.]

MEMORANDUM OPINION

This is a petition to review an order approving a compromise that had the effect of reducing the sale price of the assets of the corporation from $161,000.00 to $142,000.00.

The review is sought by creditors holding over one-half of the unsecured claims. The question involved is whether or not the Referee had the power to approve the compromise under the circumstances of this case.

The debtor was a functioning corporation engaged in bottling and selling root beer. Its assets were sold

at auction free and clear of liens to the highest bidder, the Wil-Rud Corporation, and the sale was duly confirmed. The business was then turned over to the buyer which paid part of the price. The balance was not paid, and an order to show cause why this amount should not be paid was issued. At the hearing the buyer offered the defenses that it had submitted its bid on the basis of an inventory shown to its agent; that a check made after possession was taken showed inventory shortages totaling a large sum, and that certain cases of bottles owned by the debtor were being held by distributors subject to a sixty cents deposit made on each case, which was not reflected in the inventory. The buyer thus claimed that it should not be held liable for the full amount of the bid but should be allowed a reduction.

The Receiver filed a petition to compromise this claim, and over objections at the hearing, the Referee ordered its approval in accordance with §27 of the Bankruptcy Act (Title XI USCA, §50). As a consequence the price arrived at was $142,-000.00 rather than the $161,000.00 bid.

It is well settled that the rule of caveat emptor does apply to bankruptcy sales, and after discovery of a defect covered by this rule, a purchaser cannot refuse payment of the purchase price or claim abatement. (4 Collier on Bankruptcy 1588; John Schaap & Sons Drug Co. v. Rone, 19 F. (2d) 517, (C.C.A. 8th Circ.); Hall v. McGehee, 37 F. (2d) 854, (C.C.A. 5th Circ.); Handlan v. Bennett, 51 F. (2d) 21, (C.C.A. 4th Circ.). However, as stated in 4 Collier on Bankruptcy 1588:

"The rights and quantum of property acquired by the purchaser depend primarily upon the terms of sale as ordered or agreed upon. In the absence of specific warranty clauses the bankruptcy sale is governed by the rule 'caveat emptor.' "

At the auction it was understood that a going business was the subject of sale, and it was expressly announced that the sale was "as is." As the purchaser made no objection before confirmation, it must then be held to have taken the property subject to that condition. (Handlan v. Bennett, 51 F. (2d) 21, (C.C.A. 4th Circ. 1931); In Re Rapier Sugar Feed Co., 13 F. Supp. 85 (1935).

In the Order of Confirmation the sale was stated to be of all machinery, fixtures, equipment, all inventory, all furnishings, all supplies, etc., located at a certain address, together with all other physical assets wheresoever situated, "as of October 15, 1947, at 5:00 o'clock P.M.;".

The purchaser claims that it based its bid on an inventory of the business made July 28, 1947, and shown to its agent about ten days before the bidding, October 15, 1947. After it took over, certain items were not found to be present as per the inventory. This was one of the bases for the refusal to pay.

The sale was not represented to be offered or made of all assets reflected in this inventory, nor was the bid stated to be offered on that basis at the sale. In fact, the bid was expressed to be offered on the same basis as that of a competing bidder, who bid $160,000.00, only $1,000.00 less than the suc-

cessful bidder. There was no mention of any inventory in this competing bidder's offer, but it was stated to be "for all of the outstanding shares of Yankee Doodle Root Beer Company," which was a wholly owned subsidiary, "and for the physical assets of California Associated Products, * * *."

This was an operating business. The language clearly shows that the sale was of all such assets on hand at that time, and not of assets which may have been on hand two months previous. Under these circumstances the buyer was not justified in failing to complete the sale in this manner by a refusal to pay. The conditions of the sale preclude any such arguments.

The case of In Re Solantkias, 33 F. (2d) 200, (D.C.W.D.Pa. 1929) offered a very similar situation. There also the purchaser sought to withhold part of the purchase money, claiming that the goods did not in fact conform to the inventory submitted by the Receiver to the bidders at the public sale. The court stated as follows:

"We concur in the views expressed by the referee that Diamond had no right to withhold the payment of the $3,500 on account of alleged discrepancies between the inventory and the goods actually turned over by the receiver Diamond. This was a judicial sale to which the rule of caveat emptor clearly applied. If a fraud be practiced upon the purchaser at a public sale, he should immediately ask to have the sale set aside and return the property. The court could then give him the relief to which he is

entitled. He could not adjust that matter himself by withholding a part of the purchase money."

See also In re Bender Body Co., 139 F. (2d) 128, (C.C.A. 6th Circ., 1943; Hall v. McGehee, supra.

There is, however, another ground on which this order should be reversed. The validity of a bankruptcy sale is not open to inquiry or impeachment in any collateral proceeding in either a state or federal court. (Slocum v. Edwards, 168 F. (2d) 627, (C.C.A. 2nd Circ. 1948); 4 Collier on Bankruptcy, 14th ed. p. 1587, 1588; Tuck v. Patterson, 29 A.B.R. (N.S.) 88, 60 S.W. (2d) 328). The proper method for questioning the sale is by a petition to review the order of confirmation, which would have to be filed within the allowed period, (§39, sub. (c) Bankruptcy Act, 11 USCA §67, sub. (c); In Re Bender Body Co., supra), or by a petition to vacate or set aside the sale. (In Re Solantkias, supra; In the Matter of Union Co-op. Bakery, 4 F. (2) 535, (C.C.A. 6th Circ. 1925); 4 Collier on Bankruptcy 1581; Staley v. Dwyer, 29 F. (2d) 982). If the purchaser desired relief from an onerous sale these were the methods it should have used. It should not be entitled to keep the benefits of the sale as a successful bidder, and, at the same time, get a reduction in the price merely by its refusal to pay the purchase price. This would seriously prejudice the rights of other bidders and creditors or the debtor, and might act as a fraud on them. This would particularly be so here in view of the fact that the unsuccessful bidder bid only $1,000.00 less than the sale

price. In the administration of bankrupt estates *e*ith the many complicated problems that arise therein, irregularities often occur. It is important that the confidence in the stability of judicial sales be not destroyed. (Scott v. Jones, 118 F. (2d) 30, 32, (C.C.A. 10th Circ. 1941); In Re. McCann, 250 F. 1006, (D.C.N.D., N.Y.); In Re Strunks Lane & Sellico Mountain Coal & Coke Co., 64 F. Supp. 731 (D.C.E.D. Ky. 1946); In Re Wolke Lead Batteries Co., 294 F. 509, (C.C.A. 6th Circ. 1923). To induce bidding at such sales and reliance upon them, the purpose of the law is that they shall be final. Currin v. Nourse, 66 F. (2d) 137, (C.C.A. 8th Circ. 1933); Pewabic Mining Co. v. Mason, 145 U.S. 349, 356, 12 S. Ct. 887. A good discussion of the consequences of such action as here presented is found in In Re. Bender Body Co., 47 F. Supp. 224; affirmed in 139 F. (2) 128.

Against this argument the buyer claims that the power to approve a controversy is one of the broadest powers conferred by the Bankruptcy Act, and once a Referee approves such a controversy, his action should be set aside only for a distinct abuse of discretion. (2 Remington on Bankruptcy 720, 721; In re Stuart, 272 F. 938 (C.C.A. Ohio); In re Paley, 26 F. Supp. 952; Scott V. Jones, 118 F. (2d) 30). Weighing both of these, it is clear that the power to compromise if applied as here can undermine any stability in judicial sales and open wide the gate for the re-examination of public sales in bankruptcy.

In this matter the equities are not with the purchaser. The approval places a direct loss upon the creditors as the next bidder had offered $160,000.00. If the compromise should stand the creditors will suffer a loss of $18,000.00. If the purchaser had acted in good faith, he would have rescinded the sale and if approved by the Referee a new sale could have been held, and the creditors would have been protected. As it now stands the purchaser desires to retain the advantages of his bargain together with the refund sought through compromise. The purchaser purchased the assets of this corporation at a public auction knowing full well what he was buying and I see no reason why he should not be held to his bargain.

In view of the fact that the petition to compromise, filed after the confirmation of the sale was a collateral attack on the sale, and considering the consequences of such action if permitted, the order of the Referee in approving the compromise is hereby reversed.

Dated: This 16th day of December, 1948.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed Dec. 16, 1948.

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING PETITION FOR REVIEW AND REVERSING ORDER OF REFEREE APPROVING COMPROMISE

This matter coming on before the undersigned upon a Petition for Review filed by certain creditors to review an Order made by Hugh L. Dickson, one of the Referees in Bankruptcy of this Court on the 26th day of February, 1948. The petitioners on review herein being the following, to-wit: Bank of America National Trust & Savings Association, a creditor represented by its attorney John Walters, Leo Brill, a creditor represented by his attorney Maurice M. Goodstein, F. W. Boltz Corporation, a creditor represented by its attorney Frank T. Cotter, Victor Kramer, a creditor represented by his attorney Hugh Ward Lutz and Aaron Levinson, a creditor represented by himself. E. A. Lynch, the receiver and trustee appeared and filed a brief herein and was represented by Craig, Weller & Laugharn by Hubert F. Laugharn, his attorneys. Permission was granted to the Wil-Rud Corporation through its attorney, Charles J. Katz, to appear and file a brief herein.

The Court made and filed herein its Memorandum Opinion dated December 16, 1948, and adopts herein the findings therein contained and in addition thereto,

Now, Therefore, the Court makes the following Findings of Fact, Conclusions of Law and Order reversing the Order of the Referee of February 26, 1948, which approved the Petition to Compromise a certain controversy with the Wil-Rud Corporation. The Court cannot adopt the Findings of the Referee in this matter and therefore finds:

1. That E. A. Lynch was the duly qualified and acting receiver in the within proceedings and conducted the going business of the bankrupt from his appointment on July 29, 1947, as receiver, to and including October 15, 1947. That on October 15, 1947, he brought on for sale in open court before the Referee certain assets of the debtor corporation. At such time there was competitive bidding. A bidder offered $160,000 and thereupon a bid of $161,000 was made on the same terms by the Wil-Rud Corporation "for all of the outstanding shares of Yankee Doodle Root Beer Company and for the physical assets of California Associated Products * * *". Thereupon said bid and offer of Wil-Rud Corporation was accepted by the Court and the receiver, and the sale was confirmed by an order of the Referee, and the Wil-Rud Corporation paid $125,000 on said purchase price of $161,000.

2. That the business and assets had been in the possession of the receiver for some period of time and he had been carrying on the business of the bankrupt corporation. That his inventory of the assets was made at the inception of the proceedings,

to wit: as of the close of business on July 28, 1947, and was not corrected or adjusted from day to day. That said inventory does not purport to be other than an inventory made as of July 28, 1947. That this fact was made known to all bidders. That at the time of the sale the said assets were offered "as is" and without any warranty as to quantity or quality and without any reference to an inventory. That immediately after the confirmation of the sale, the assets so sold were delivered to the Wil-Rud Corporation. That thereafter the Referee's order approving and confirming the sale was approved in writing by the Wil-Rud Corporation and signed by the Referee on October 22, 1947. That thereafter a controversy arose between the purchaser and receiver as shown in paragraph II(a) and (b) of the receiver's Petition for Leave to Compromise re Wil-Rud Corporation sale.

3. That thereafter the receiver petitioned said Referee for authority to compromise said controversy. Ten days notice of the receiver's petition was given to all creditors and upon the hearing the petitioners on review herein, who are creditors in the within proceeding and who represent over one-half in amount of the unsecured claims approved herein, appeared and objected to the confirmation of the said compromise. That the record does not show that any creditors were in favor of said compromise.

4. That said sale was not made on the basis of a sale of the assets as reflected in the receiver's

inventory as of the close of business on July 28, 1947, nor was the bid of Wil-Rud so made.

5. That the said Wil-Rud Corporation was not warranted in relying upon nor did it rely upon the inventory in making said bid. That it was not in the best interests of creditors that the said proposed compromise be ordered.

6. That no review was taken at any time by Wil-Rud Corporation from the Order of Sale to it and that the same is final; and that said Wil-Rud Corporation has taken no steps to set aside such sale or return the property delivered to it by the Receiver.

The Court concludes as a matter of law that:

1. The Order of October 22, 1947, confirming the sale of the assets of this estate to Wil-Rud Corporation for the amount of $161,000 is final and that no review has been taken therefrom.

2. That the within proceedings cannot be maintained as a collateral attack upon the Referee's order of sale dated October 22, 1947.

3. That the equities herein are not with the purchaser in that there was a bid of $160,000 which was rejected because said Wil-Rud Corporation increased said bid by $1,000; that said bid of $160,000 was for the assets as they then existed and not with the qualifications or restrictions now insisted upon by said Wil-Rud Corporation. That the credi-

tors of this bankrupt will suffer a loss of $18,500 if the order of compromise is finally approved.

4. That said Wil-Rud Corporation did not disaffirm the sale but took possession of the assets and cannot in this manner attack the sale; and said Wil-Rud Corporation is bound by the rule of caveat emptor.

5. That there is no evidence that anyone has ever claimed a lien against the property purchased by said Wil-Rud Corporation from the receiver, other than the conditional sales contract holder specifically mentioned in the order confirming the sale to Wil-Rud Corporation.

Therefore, for the reasons as set forth herein, the Order of the Referee dated February 26, 1948, affirming the Receiver's compromise whereby he credited to the Wil-Rud Corporation the amount of $18,500 upon its purchase price of $161,000 should be and the same hereby is reversed and set aside, and said petition to compromise denied.

Dated: May 24, 1949.

/s/ BEN HARRISON,
U. S. District Judge.

Judgment entered and Docketed May 26, 1949.

[Endorsed]: Filed May 24, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Petitioners for Review, Bank of America National Trust and Savings Association, Leo Brill, F. W. Boltz Corporation, a California Corporation; Victor Kramer, and Aaron Levinson, and to Their Respective Counsel of Record, and to E. A. Lynch, Receiver and Trustee in the Above-Entitled Matter, and to His Counsel of Record:

Notice Is Hereby Given that Wil-Rud Corporation, a party aggrieved by the Order granting Petition for Review and reversing Order of Referee Approving Compromise, heretofore made and entered on May 26, 1949, in Judgment Book 58, page 475, of the above-entitled court, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain Order granting Petition for Review and reversing Order of Referee Approving Compromise heretofore made and entered on May 26, 1949, in Judgment Book 58, page 475, in the office of the Clerk of the above-entitled court, whereby the Order dated February 26, 1948, of the Referee was reversed upon the Petition for Review of Aaron Levinson, Bank of America, Leo Brill, F. W. Boltz Corporation, and Victor Kramer.

Dated this 20th day of June, 1949.

/s/ CHARLES J. KATZ,
Attorney for Appellant,
Wil-Rud Corporation.

[Endorsed]: Filed June 21, 1949.

In the District Court of the United States, Southern District of California, Central Division

No. 45,137—BH

In the Matter of

CALIFORNIA ASSOCIATED PRODUCTS,
Debtor.

Before: Hon. Hugh L. Dickson,
Referee.

REPORTER'S TRANSCRIPT OF PROCEEDINGS IN RE HEARING ON PLAN FOR SALE OF PROPERTY

Appearances:

EDWARD LYNCH,
Receiver.

MARTIN GENDEL, ESQ.,
For the Receiver.

CHARLES J. KATZ,
For Samuel C. Rudolph.

AARON LEVINSON,
For Mr. Miller.

FRANCIS F. QUITTNER,
For Preferred Stockholders.

HUGO A. STEINMEYER, ESQ.,
For the Bank of America. [1*]

Wednesday, October 15, 1947

The Referee: What is the plan?

* Page numbering appearing at top of page of original Reporter's Transcript.

Mr. Levinson: Your Honor, at the outset, I would like to state that I am not here representing any purchaser or any creditor other than myself—and I think a small creditor in the amount of $25. What I have to say is not as an attorney for any one.

After the last meeting here, it was the thought of two of the other attorneys who represent large creditors and myself that a meeting should be held in an endeavor to straighten out some of the confusion which existed here last week and so that something concrete can be presented to you. Accordingly, on Friday afternoon the representatives of the largest creditors met, representing over $200,000 unsecured claims; and we met again yesterday afternoon.

Now, it was the consensus of opinion of those creditors that we should consult with all parties interested in an endeavor to obtain the best bid from those parties and from any one that we could interest and submit it to the Court. We were advised before we met yesterday afternoon by Mr. Katz who represents Mr. Rudolph, that regardless of any bid which the group might present to the Court, that it was his intention to ask the Court to open the matter to bidding; that is, I assume—while Mr. Katz didn't say it—if we didn't agree to recommend his bid, the bid that he offered on behalf of Mr. Rudolph. The creditors who were present said they represent over $200,000 worth of unsecured claims and they have given consideration to

the plight of the franchise holders; and both offers of Mr. Rudolph and the other offer contemplate that the business would be continued. Each offer contemplated—and by the way, we have to eliminate Mr. Weiser's offer because his offer, while in writing, is much lower than that of either of the bids which were submitted to us. It was the consensus of those present that we would recommend to the Court that the Court direct the Receiver to make an immediate sale to the bid which was accepted by the Court. I have the bid here with a check accompanying it, the one which the creditors decided to recommend to the Court, and I will read it for the benefit of all those who are interested. It is directed to Mr. Lynch, the Receiver.

"The undersigned proposes to pay for all of the outstanding shares of Yankee Doodle Root Beer Company"——

and that, by the way, is a wholly-owned subsidiary, I understand, and its franchises for the assets of the Yankee Doodle Root Beer Bottling Company—that is merely a trade style, which is owned by the debtor——

"and for the physical assets of California Associated [3] Products, subject to the following exceptions, the sum of $135,000. In addition to the foregoing, we are to receive all trade names, trademarks, all formulas, and registered trade styles, and the lessee's interest in the lease,"——

and I might say, your Honor, with regard to the lessee's interest in the lease, that it is understood that the purchaser will be able to obtain the consent of the landlord to the purchaser continuing the business. I have talked with the landlord in person and the landlord assured me that if the purchaser was a responsible person, a responsible corporation, that they would consent to the transfer of the lease to the purchaser. However, that contingency exists with any purchaser and all of the purchasers are assured that they will get the consent of the landlord for the lease.

The offer goes on:

"We are not to receive any of the merchandise held by the Bank of America as security for its pledge or any items held at Fresno to secure two pledges of firms located there. Nor are we to receive the cash on hand, accounts or notes receivable, or deposits made by those corporations. We will take over the existing insurance on a pro rata basis. Title to all property delivered to us is to be free and clear except the water softener." [4]

And, I might say that Mr. Katz informed my office that there is a balance due on the water softener of $1,699.17; so the offer is $136,699.17.

"A check for $10,000 is tendered herewith as evidence of good faith. Confirmation of the sale is to take place on or about October 20, 1947.

Yours very truly,"

Signed by Mr. Miller.

Now, it is the unanimous opinion of the cred-

itors who were present at this meeting—and they represent over $200,000 in the amount of claims—that this offer should be accepted and the Receiver should be directed to sell.

Mr. Katz: I stated to the creditors' committee, and I state in open court that as a matter of sound public policy and the proper administration of the Bankruptcy Act that I do not believe that it would be wise to follow the practice which Mr. Levinson laid out to me which was this——

The Referee: I am going to sell it to the highest bidder for the greatest amount of money in the interest of all creditors. I cannot say that I am bound or interested in the interests of any creditors' committee. Whatever we sell here will be sold to the man who is willing to give the greatest amount of money for it. You needn't talk to me about that.

Mr. Gendel: May I clarify one problem that we have here: Apparently, in the subsidiary company of Yankee Doodle [5] Root Beer, the corporation, there is held an asset consisting of the promissory note reflecting an unpaid balance from Loma Linda that is an Adventist institution in the Southern part of our state. The unpaid balance is approximately $4300 and I would like the bidders to keep in mind that although we would be selling all of the stock of the Yankee Doodle Root Beer Company, nevertheless, it is the intent of the Receiver, unless the bid is decreased by a comparable amount, to retain the promissory note and the accounts receivable of $4300. Mr. Levinson's offer pointed out that

there is a problem of proration on insurance, for the reason that the proration of insurance will net the estate approximately $3,000. So, we want the reservation of that proration kept in mind. The last item that we would like to retain, unless the bid is increased by a comparable amount, would be such rights as belong to the estate arising from the payment of life insurance by the debtor corporation on the lives of Thompson and Greene. We understand that there is a cash surrender value of approximately $1500 and, therefore, we would like to reserve that for the estate. I thought it well to point out those problems to the prospective bidders, your Honor, so that there wouldn't be any confusion after the highest bid is accepted.

The Referee: Let me call your attention to this fact: Yesterday there was filed a petition in reclamation by the Western Crown Cork and Seal Corporation alleging that they [6] were the owners of 1—C.E.M. 40 V machine No. C & M-1 general mixer. They claim that that was sold on conditional sales contract. I don't know anything about it.

Mr. Levinson: We have that in mind. May I say something further in view of your Honor's remark with regard to accepting the highest bid. I think your Honor, in fairness to these gentlemen, Mr. Miller and his group, and also with respect to the creditors' committee which has worked so hard on this matter, that if your Honor is to open this matter up for bidding, that the first bid should be

a substantial increase over the bid which I have just read. I don't think that we ought to start with peanuts.

The Referee: Well, I will try to run this sale according to the best of my ability. After some twelve years of experience, I say to you that it is now my definite policy to get the greatest amount of money in every case. I don't care who pays it.

Mr. Katz: The Court read a petition in reclamation from the Western Crown Cork and Seal Corporation. Under your proposal, do you expect the amount of that indebtedness, if it is upheld, to be added to the amount of your bid?

Mr. Levinson: I don't have any bid.

Mr. Katz: I don't mean your bid. I will reserve my own opinion as to that. The bid you read, does that contemplate that the bidder takes the assets, subject to the claim of the Western Crown Cork and Seal Corporation, or do [7] the creditors, out of the cash of $135,000 pay that balance?

Mr. Levinson: Let's be fair about this. You have indicated that it is my bidder. This is my bidder that you reserve your opinion as to whether it is my bidder or not. Let's be frank.

Mr. Katz: I have the constitutional right to form my opinion.

Mr. Levinson: I don't have to answer your question then.

Mr. Katz: May the Court ask the bidder whether his bid is free and clear of the Western Crown Cork and Seal, or whether it is to be paid out of

the amount that he is bidding. We want to be bidding on a par. That is my point.

The Referee: Well, Mr. Levinson has indicated disinclination to answer it. I don't know why there should be so much secrecy. Now, he has disclaimed any assumption that it was your bid. I join with him in that disclaiming. Now, I am asking you what he asked you, if you take it free and clear or do you intend to pay this claim if it is allowed?

Mr. Levinson: The bidder does not pay; the estate pays it if it is found to be a valid claim.

Mr. Lynch: That is in the sum of $11,725.

The Referee: I thought it only fair to call your attention to that fact because it may or may not detract from the assets here; and in addition, Mr. Radkin asked for [8] a reasonable attorney's fee. That may be one thousand or two thousand dollars or four thousand dollars more. I have a very different idea of what he will get.

A Voice: I represent the Yankee Doodle Root Beer Bottling Company of San Fernando Valley and therefore have a status to speak, being a franchise holder. The thing that concerns us and which should be brought to the attention of the creditors is that a certain manufacturing company selling coolers, a piece of equipment of some several thousand dollars sale price, are now making the claim that they sold such a piece of equipment to the Yankee Doodle Root Beer Company on a conditional sales contract, that being the same piece of equipment that company proceeded to sell to my clients

and for which my clients paid cash. Now, it is of course our position that we made a legitimate purchase and I understand the record of the Yankee Doodle Company show that the piece of equipment was shipped on open account. However, if there is going to be such a claim that it was sold on a conditional sales contract, there would be an additional claim by my clients against Yankee Doodle Root Beer Company, apart of the fact that I have recommended prosecution.

The Referee: You will have to see Mr. Simpson about that.

Mr. Katz: We are prepared to bid, Judge Dickson, on the same basis as I have just actually asked so we know [9] what we are talking about. If Mr. Levinson would indicate exactly whose bid it is, we intend to bid on the same basis as the bid that he labels so that we know what we are talking about.

The Referee: I understood him to mention a Mr. Miller. It was a creditors' committee bidder.

Mr. Katz: We are prepared to bid on the basis of that bid and bid higher.

The Voice: There is one more thing that must be brought to the attention of the Court. In connection with these bids, we want to know if they are assuming, or if there is any question that they are assuming the contractual obligations to the existing franchise holders, or if they are being totally disregarded.

The Referee: I can't answer that. I don't know.

Mr. Gendel: We are only selling our interests.

The Referee: I don't see how you can bind the purchaser.

The Voice: That may result in some considerable litigation.

The Referee: Don't threaten me with it.

What is the bid, Mr. Katz?

Mr. Katz: So there is no question, do I understand that the bidding now is on the basis of a sale by the Receiver pursuant to his equity power to sell the assets as distinguished from any plan? [10]

The Referee: That is the way I understand it.

Mr. Gendel: Mr. Katz, as I understand the situation, counsel for the debtor in and within the provisions has indicated to the Court that he has no plan to give to the Court. So, in preserving the assets, including the lease and the other items that might be called perishables, if delay ensues we feel that this Court has the power to approve a sale by the Receiver as part of the Chapter 11 proceedings and it is under that authority that we assume the Receiver will sell free and clear except as to those items that contain a sale of the right, title, and interest in the lease only.

Mr. Katz: We bid on the same basis as the Miller bid, $137,500.

The Referee: $137,500. Any other bids?

Mr. Miller: If your Honor please, I made the original bid. We presented our plan here in court and apparently our plan was not given considera-

tion at the last hearing. It was read, and there was nothing more said about it. We feel that we had the interest of both creditors and the equity holders in mind, and apparently the other bidders do not feel so. So, if your Honor please, we will up our bid to $140,000.

Another Bidder: $141,000.

Mr. Miller: $145,000.

Another Bidder: $146,000. [11]

Mr. Miller: $150,000.

Mr. Katz: Would your Honor mind about a two minutes' recess?

The Referee: The court will take a ten minutes' recess.

(Recess.)

Mr. Gendel: The original bid as read said the lessee's interest in it. We will sell the right, title, and interest of the estate in and to the lease.

Mr. Katz: That isn't Mr. Miller's bid now.

Mr. Gendel: We only know the way that we can deliver to the buyer, what the Receiver represents he can deliver.

Mr. Adams: I represent Mr. Ward, one of the franchise holders, and I object to the sale proceeding until the terms of the sale are established so that the bidder and the claimants know where they stand with reference to the terms of that bid and possibly take it in before the Court and get a ruling.

The Referee: I don't quite understand what you are talking about.

Mr. Adams: I think the terms of the sale should be established before the property is offered for sale. I object to the sale proceeding until those terms are established, including the right of the franchise.

The Referee: I don't consider the franchise holders own any part of the assets of this estate. They have a contract with the debtor corporation for certain things, [12] but I don't see that they have any assets in the estate. However, you can make any objection you see fit.

Mr. Katz: As I understand it, Mr. Miller is bidding on the basis that the lease be put into good standing.

Mr. Miller: If your Honor please, I will change the wording; we will make this bid subject to our being able to obtain the lease from the landlord.

Mr. Gendel: You can't do that, Mr. Miller.

The Referee: You must realize that this Court has no control over the assets of that landlord. He might say "I don't like the color of your hair, or for any one of nine hundred good reasons, he might refuse to give you a lease. I can't sell it with that condition attached to it.

A Stockholder: On behalf of the controlling common stockholders, I would like to be heard briefly on the subject of this lease. I think this fact should be clearly understood by the bidders so that there can be no subsequent misunderstanding. The owners of that building have promised certain individuals and not these bidders that they will

have their first and prior right to receive a lease on the property.

Mr. Gendel: May I interrupt this gentleman for a moment. I don't know what the prupose of his speech is except to depreciate the assets that are being sold. I don't see how that can benefit the common stockholders or the estate as a whole. If that is the position the common stockholders hold, I think that counsel speaking has no stand in the court. He doesn't speak for the landlord. It is a rather unusual situation to discourage prospective bidders when an estate is supposed to benefit from the bidding.

The Referee: Who do you represent?

The Stockholder: I represent Mr. Greene and Mr. Thompson and certain other common stockholders. The purpose of these remarks was simply this: If there is to be any condition attached to this bid, if it is to be based in any way whatsoever upon the successful bidder procuring the piece, then this estate is going to be thrown into the utmost confusion and this sale here this afternoon will but serve to confuse this whole matter. We ask, if the Court please, that if there is to be a sale this afternoon that the phase pertaining to the lease be most clearly defined. Otherwise, the bidder at a subsequent time may raise a lot of problems that are not before the Court now.

The Referee: All right.

Mr. Katz: Mr. Rudolph bids $146,000 on the same basis as the Miller bid excepting only that

with respect to the lease he will take whatever right, title, and interest in the estate that the estate can convey to him.

Mr. Gendel: That is the way to bid it.

The Referee: All right. $146,000. Does any one want to bid over that? [14]

Mr. Miller: We would like a recess.

The Referee: Are you willing to give more than $146,000? I am not going to have any more recesses. You are all grown-up men and you come here knowing fully what you are willing to pay. No use back fishing.

Mr. Miller: If your Honor please, we endeavored to discuss with the landlord today on this matter and unfortunately he is in the hospital. The owner of the property is in the hospital sick. I think we should have the same right to talk to him.

The Referee: I am not going to agree with you. I am going to settle this this afternoon. The question is, do you want to bid in excess of $146,000 without any assurance that you will get a lease?

Mr. Quittner: I represent the preferred stockholders, if the Court please. I just want to interpose this statement. If any of these bidders know that they can get a lease, it is quite obvious——

Mr. Katz: We don't know anything of the kind.

Mr. Quittner: The original bid was $150,000.

The Referee: Mr. Miller attached a condition on his bid of $150,000.

Mr. Katz: I say to you categorically we have no assurance whatsoever.

Mr. Levinson: The deal between Mr. Rudolph and Mr. Thompson and Mr. Greene, as I understand it, is that as far [15] as the debtor corporation is concerned, that the debtor corporation will have a chance to repurchase these assets at a certain price if we purchase it within thirty days, and at another price if it is repurchased within sixty days, and at another price within ninety days.

Mr. Katz: That was the plan of settlement at $125,000. This is a liquidation sale.

The Referee: What I want is bids; I don't want any more blocks thrown in the way of this sale.

Mr. Levinson: I am not throwing any blocks.

The Referee: I am asking for bids. I don't want any more tales of what happened two or three weeks ago. Does anybody want to bid more than $146,000 for this property. Apparently there are two groups here that are trying to get a loggerhead. What I want is the most money. I am going to sell it pretty quickly now.

Mr. Miller: Will you please withdraw your ruling against a recess for a few minutes? I believe these parties who have come up here to bid should have a short opportunity for consideration.

The Referee: I understand you were in a huddle yesterday afternoon.

Mr. Levinson: They were not with us.

The Referee: Let me say this to you: If I should reverse my ruling and give you a ten min-

utes' recess, it will be with the understanding that your bid is without any [16] requirement that this Court or this Receiver deliver the lease to you. You can throw that out the window, because we can't do that and we can't promise that.

I will give you a ten minutes' recess.

(A short recess.)

The Referee: What is the bid now? The last bid was $146,000, as I recall.

Mr. Steinmeyer: May I make a statement: I represent the Bank of America, which is an unsecured creditor. The Court may desire testimony as to the matter that I am about to address to the Court, but the information that has been given to me is that the difficulty with respect to the lease on this property and the possible assignment of the lease by the debtor corporation to the purchaser at the sale arises from the fact that Mr. Greene and Mr. Thompson, the officers of the debtor corporation, have heretofore approached the landlord and secured the representations of the landlord that he would give them a lease if the property was sold. Now, they represent the officers and the equity owners to a great extent of the debtor corporation. I think that if that action has been taken and if those statements are correct, that their conduct has been contrary to the best interests of the estate and that under those circumstances the Court should direct that if any such lease should be obtained, that it would become the asset of the Receiver of

this estate and not the officers [17] of the debtor corporation.

Mr. Katz: It is agreeable to us as a bidder.

Mr. Tobin: Mr. Steinmeyer is absolutely right on that.

Mr. Levinson: Mr. Thompson, Mr. Greene, and I can testify as to what our conversation was with the landlord with regard to that which has resulted in a stifling of bidding as far as one group here is concerned. I think that these two gentlemen are merely trustees for the benefit of the shareholders and the creditors, and I think that they should not have the right either directly or indirectly that this lease be given, or the consent be given, to any particular purchaser whom they may favor. That it should belong to the Receiver.

Mr. Katz: As one of the bidders, we haven't any objection to that position.

The Referee: All right, sir.

Mr. Lesser: I represent the majority of the preferred stockholders. Most of the money that went into this transaction originally came from the preferred stockholders. We believe that Chapter 11, as we understand it, provides that the Court should give consideration—we appreciate the fact that the prime consideration is to the creditors—but as preferred stockholders, if we may, we would like to interpose at this time to say that once this question of lease is straightened out, and it can only be straightened out through one of the gentlemen who is in the hospital and [18] a couple of

days, or maybe one day will do it, that the preferred stockholders are in a position here to add a sum of money over and above the bid to be added to the bid as set forth by Mr. Miller. It will be to the advantage of the creditors here, and the preferred stockholders will get a break in this particular situation to which they are entitled and we believe it is for the best interests of everybody concerned, as well as the franchise holders and the preferred stockholders.

The Referee: How long has this man been in the hospital?

Mr. Lesser: He is in the hospital for two days.

The Referee: Why didn't you go to see him in the hospital? I am not going to continue this. I am going to ask for the highest bidder this afternoon. Any other bids now? I gave you ten or fifteen minutes to huddle on this thing.

Mr. Steinmeyer: I think if the Court would make a ruling to any lease obtained by Thompson or Greene will be held in the trustees.

The Referee: That is right; or anybody deriving the benefit from it.

Now, what is your bid? I gave you fifteen minutes.

Mr. Miller: We bid $150,000 on that condition.

Mr. Gendel: Just on behalf of the Receiver, on what condition? [19]

Mr. Miller: The condition just stated that it be made a part of any agreement that Thompson and Greene had with the landlord which would become

the property of the Receiver and as part of the assets of the debtor corporation; is that correct?

The Referee: That is right.

Mr. Gendel: You understand the Receiver is selling the title and interest to the lease only.

Mr. Miller: I am talking about what the Judge just ruled.

A Bidder: $151,000.

Mr. Miller: We bid $155,000.

The Bidder: $156,000.

Mr. Miller: $157,000.

The Bidder: $158,000.

The Referee: $158,000 once, twice,——

Mr. Miller: We bid $160,000.

The Bidder: $161,000.

The Referee: Sold for $161,000 to the Wilrod Corporation.

Mr. Gendel: May I on behalf of the Receiver make a closing statement in connection with what I understand the Receiver wants to confirm as part of the sale so that there is no question.

The Receiver is selling to the buyer all of his right, title, and interest in and to the lease of the premises in [20] question occupied by the debtor corporation. The Receiver is likewise selling the Receiver's interest in stock certificate No. 6, representing three shares of Yankee Doodle Root Beer Company, a corporation, which we have been told are all of the issued shares of the subsidiary company. The Receiver is selling the machinery, equipment, and fixtures located at the place of business

of the California Associated Products Company, 3631 Union Pacific Avenue, and the inventory as is now subject only to the balance owing on the water softener of $1699.17. As to the Western Crown Cork and Seal problem, the estate will deliver that free and clear and will fight out the rights with the conditional sales claimant. The Receiver is not selling the following items: Cash on hand or accounts receivable existing prior to the commencement of the debtor proceedings or now created and existing on behalf of the Receiver. The Receiver will obtain from the purchaser a proration on the existing business insurance. The Receiver is not selling a promissory note of the Loma Linda Company which has a present balance of approximately $4300. The Receiver is not selling the right to the cash surrender value of life insurance to Thompson and Greene which we understand has a present value of approximately $1500.

Now, is that clear, Mr. Katz?

Mr. Katz: I can't carry all that in my head. Mr. Levinson read the terms of the bid. We bid on those terms. The variation was with respect to the lease and we varied it. After we make our bid—I am not saying there are any changes in your terms from what Mr. Levinson read—but we are prepared to complete the bid as we made it on the basis of the Miller bid, subject to only one change, subject to the right and title to the lease, subject to the condition that whatever rights Thompson and Greene have, inure to the benefit of the purchaser.

Mr. Gendel: If your Honor please, before the bidding went into its higher brackets, I read the items which have now been again itemized and I think to eliminate any question of the items as specified should be conceded by the buyers because that is the basis on which the Receiver can sell and now is the time to do it.

The Referee: I think practically all you have said, and as I understood it thoroughly, is that these bidders are not buying the accounts receivable and they are not taking over the cash, but that they were getting the lease in, as and when they were getting it.

Mr. Katz: Let's have the transcript made up.

Mr. Gendel: The other items that were specified by the Miller bid is that we understand that the bidder is not buying any rights in and to those items which are pledged, one, with the Bank of America, and two, the two items at Fresno, being the Monarch wines and the raisin syrups. My only purpose is that the buyer should not be in a position [22] at a later date to feel that any items were contended for by the Receiver, that it had not been revealed to him at the time of the confirmation of the bid.

Mr. Lynch: The bidder will take this business over as of what date; and will continue to operate, and what will happen to the profits, if any, that are derived from the operation of this business?

Mr. Gendel: Mr. Katz, do you want it tonight?

Mr. Katz: I think we want to get the order.

Mr. Rosen, on behalf of the debtor corporation, s there any objection to the sale, just for the ecord?

Mr. Rosen: With as much power as I have, with o board of directors meeting, I have no objection n behalf of the corporation.

The Referee: This meeting is adjourned. The ale is confirmed for $161,000 to Samuel C. Rudolph & Associates, Incorporated, a corporation.

In the District Court of the United States, Southern District of California, Central Division

Before Hon. Hugh L. Dickson, Referee.

State of California,
County of Los Angeles—ss.

I, P. A. Tsokas, official reporter, pro tempore, of he above-entitled court, do hereby certify that he foregoing pages 1 to 23, both inclusive, comprise a full, true, and corect transcript of the proceedings in re hearing on plan for sale of property.

Dated this 6th day of November, 1947.

/s/ P. A. TSOKAS,
Official reporter, pro tempore.

[Endorsed]: Filed April 13, 1948.

[Title of District Court and Cause.]

HEARING ON ORDER TO SHOW CAUSE RE WIL-RUD SALE

The following is a stenographic transcript of the proceedings had in the above entitled cause, which came on for hearing before the Honorable Hugh L. Dickson, Referee in Bankruptcy, at his courtroom, 343 Federal Building, Los Angeles, California, at ten o'clock a.m., November 7, 1947.

Appearances:

GENDEL and CHICHESTER,
By MARTIN GENDEL, ESQ.,
Appearing on behalf of the Receiver.

CHARLES J. KATZ, ESQ.,
Appearing on behalf of
Wil-Rud Corporation.

E. A. LYNCH,
Receiver.

Mr. Gendel: I think we can rather briefly summarize the position of the Receiver in this case. Your Honor will recall the rather spirited bidding we had between the two entities, Mr. Rudolph and Mr. Miller, with the ultimate result that Mr. Rudolph's bid of $161,000 was accepted.

When the items were checked out to Mr. Rudolph's corporation, that is, his nominee, the Wil-Rud Corporation, they then compared the items

found in the original inventory taken under the Debtor's direction when the Debtor first came into the reorganization proceedings as against the items that were turned over to them by Mr. Lynch. They came up with two pages of items. We have a copy of that which I believe the Wil-Rud Corporation furnished to us. That copy shows alleged shortages of $15,488.99, and alleged errors in addition amounting to $3,463.17, or a grand total of $18,952.16.

The Wil-Rud Corporation then said to the Receiver, "This bid is made on a proportionate basis of about forty to forty-five cents on the dollar as to the inventory, therefore, we want a pro rata adjustment."

The matter was then referred to my office and here is our position as far as we are concerned, legally. We sold the physical assets as of five o'clock p.m., October 15, 1947. Save and except for the water softener, those assets belonging to the Debtor were sold free and [2*] clear of encumbrances. We did not sell pursuant to any inventory, as is very often the case in these auction sales. It was physically impossible for the reason that the Receiver did not have an inventory in the first instance, and secondly, every one knew the Receiver had been selling items during the time he had been in possession.

I would like to refer your Honor to the order confirming and approving the sale, which order was approved before it was submitted to your Honor

*** Page numbering appearing at top of page of original Reporter's Transcript.**

by counsel for the purchaser. I think that order estops us from going any further. I would like to refer to paragraph 1 on page 2, commencing at line 24. I don't know whether I have the date of signature or not, but I believe it was signed on the twenty-second of October.

The Referee: The twenty-second of October, you say?

Mr. Gendel: Yes, your Honor; it was signed by your Honor on the twenty-second of October.

Mr. Katz: It is headed "Order confirming and approving sale."

The Referee: I have it.

Mr. Gendel: If you will turn to page 2, line 24, your Honor, you will find what we sold with reference to the physical assets:

"The Receiver, by this order, is deemed to have sold, and does sell to the buyer, all machinery, fixtures, equipment, all inventory, all lessee's improvements, all [3] furnishings, all supplies, and all finished and unfinished products of every class and character and description whatsoever located at 3631 Union Pacific Avenue, Los Angeles, California, together with all the other physical assets of the debtor corporation, wheresoever situated, and together with all of the physical assets of every class and character of the Yankee Doodle Root Beer Company, a corporation, as of October 15, 1947, at 5:00 o'clock p.m.; . . ."

As far as the Receiver is concerned, that was the sale, nothing else. We didn't sell by inventory. As

I have indicated to the Court, that would *have been* possible. As a matter of fact, by virtue of that paragraph, we gave to the purchaser more than he bid for. Actually he bid for the shares of stock of the subsidiary corporation. That was the Miller bid,—not for the physical assets of the subsidiary corporation. When that problem was raised between Mr. Katz' office and myself, I believe I indicated to your Honor before the order was submitted that we felt it was only fair to the purchaser, who was obviously attempting to buy the physical assets located at the plant, that we sell him the assets directly instead of selling him a corporation in which he might have difficulty clearing title. So we granted to him that concession. But we cannot go farther back and say any sale was made pursuant to an inventory taken at the beginning of these proceedings. [4]

I don't know whether or not your Honor has read the transcript of the hearing on the sale.

The Referee: No. I will get Miss Marsh to bring it in to me.

Mr. Gendel: While that is being done, if the Court please, I will point out on page 21 of the transcript what occurred when the bidding was completed, and in order that there may be no question about it, I think it might be well perhaps to start on page 20 at line 21. I was speaking at that time:

"May I, on behalf of the Receiver, make a closing statement in connection with what I understand

the Receiver wants to confirm as part of the sale so that there is no question.

"The Receiver is selling to the buyer all of his right, title and interest in and to the lease of the premises in question occupied by the debtor corporation."

Mr. Katz: That is after the bidding had been completed?

Mr. Gendel: That is correct. (Reading) "The Receiver is likewise selling the Receiver's interest in stock certificate No. 6, representing three shares of Yankee Doodle Root Beer Company, a corporation, which we have been told are all of the issued shares of the subsidiary company. The Receiver is selling the machinery, equipment, and fixtures located at the place of business of the California Associated Products Company, 3631 Union Pacific Avenue, . . ." [5]

The Referee: What page is that?

Mr. Gendel: We are now on page 21, your Honor.

The Referee: I have it. Go right ahead.

Mr. Gendel: I am just coming onto line 9, which is the key to our position here. (Reading further) ". . . 3631 Union Pacific Avenue, and the inventory is now subject only to the balance owing on the water softener of $1699.17."

In other words, at no time was there any reference to this physical written inventory as being part of the sale and as to the items being sold as is reflected by the approved order. We sold only

those things which the Receiver could convey title to as of October 15, 1947.

I might also point out for the record that the purchaser obligated himself to take the things on a pro rata basis that would net the estate approximately $1000 more than the cancellation of the insurance as of the date of the close of sale. The purchaser contended that there had been over insurance in the sense that too much insurance had been——

Mr. Katz: Does that have anything to do with it?

Mr. Gendel: I think the Court should have all of the facts about the final order and what led up to it.

Mr. Katz: I have no objection to the order as it reads. The only question is what it means and in order to determine what it means we read the order by its four corners and the transcript of the proceeding as distinguished now from [6] going into collateral matters.

Mr. Gendel: I cannot conceded that position.

Mr. Katz: All right.

Mr. Gendel: I don't think it is a collateral matter. It shows the background leading up to the approval of the order which in my opinion consolidates all of the rights of the parties.

Mr. Katz: I don't disagree with that. The Court can look at the order and read the transcript and I think that tells the story.

Mr. Gendel: I don't think we have to back up

to the transcript. I think that order reflects the negotiations of the parties and reflects the agreement between the parties as well as the order of the Court.

Although the bid was on a proration of the insurance, the point raised by the bidder after the sale was that there was over insurance and supposedly the insurance companies were not board companies. taking that statement at its face value, we discussed with your Honor the right of a receiver to permit what the buyer wanted and that was a termination of the policies, a cancellation. Upon that representation the Receiver then conceded the request of the buyer, which is enumerated as part of the order, and allowed the termination of the insurance which cost the estate a little over $1000. Mr. Lynch recently informed me that the major portion of the insurance was in [7] board companies, but we have made that deal and we are not backing up on it.

I believe that this order, particularly that portion of it contained at the top of page 3, saying that we are selling the physical assets as of October 15, 1947 at 5:00 o'clock p.m. is the answer to our Order to Show Cause. I therefore feel that the purchaser should be directed forthwith to pay over the balance of the moneys.

Mr. Katz: There are a number of matters I should like to discuss, your Honor. Obviously, the purchaser is prepared to pay everything he owes and it will take no strong arm of the Court, Judge

Dickson, to require him to do so. However, there are a number of problems before us.

First, let me talk about the inventory problem, and then refer to the second problem which Mr. Gendel mentioned. If your Honor will turn to page 2 of the order, line 16, ". . . the undersigned Referee does hereby approve and confirm the sale by E. A. Lynch, as Receiver in the within estate, of certain personal property, hereinafter described, to Wil-Rud Corporation, a corporation, for a cash consideration to be paid to said E. A. Lynch, as Receiver, in the sum of $161,000, delivery of the assets to be made upon the signing of the within order, and payment therefor to be made concurrently with delivery to the buyer." [8]

Our point there is that considerable quantities of these assets have not yet been delivered to us and until they are delivered we contend we have paid by far more than the pro rata for what we have received. We are prepared to pay the purchase price as finally determined concurrently with the delivery to us of possession of the assets. As I said, a number of the assets have not been delivered, but I will take that matter up later. I don't think it is necessary to put the cart before the horse and make an order before your Honor is satisfied that the Receiver himself can complete the matter by delivering possession which is a condition to the payment. On that phase of it, when I finish answering Mr. Gendel, we will discuss the question of delivery of possession.

Now, let us take up the problem as Mr. Gendel raises it concerning the assets. The Court is in possession of the basic factual situation. The shortages, Judge Dickson, are enumerated on this sheet. I will show it to counsel and have it marked as an exhibit. Here is a copy (handing document to Mr. Gendel).

Mr. Gendel: Why don't we turn in for the Court's convenience a typed copy?

Mr. Katz: Suppose we have it marked Exhibit 1, an instrument headed "Inventory shortages at California Associated Products Co., Inc."

(The document was marked Petitioner's Exhibit 1.) [9]

Inventory Shortages at California Associated Products Co., Inc.

Page	Item No.				
11	O151	1	Kardex		$54.00
47	M307	1	Lot Scrap		25.00
49	M334	1	Lot Conduit Pipe, etc.		50.00
49	m335	1	Lot Scrap Lumber		50.00
50	M350	124	Pallets	.75	93.00
51	M360	27	Reflectors	2.00	54.00
57		3	Gal. Cola Syrup	1.00	3.00
57		2½	Cases Celery Phos. Quts.	3.25	8.13
57		1	Cases Celery Phos. Pts.	2.75	2.75
57		1½	Cases Skin Lotion	1.50	2.25
57		1	Cases Grenadine Syrup		1.50
57		2	Cases Almond Extract		6.00
58		½	Lb. Nutmeg Oil	5.75	2.87
58		¼	Gal. Rum Ether	1.75 lb.	3.50
60		1	Gal. Plantarome	8.00	8.00
64		1	Lb. Grape imitation		4.00
64		1¼	Lb. Lemon Oil Concent.	14.00	17.50
64		2	Lbs. Lemon Oil Concent.	17.00	34.00
64		12	Oz. Mandarin Oil	6.00 lb.	4.50
64		1	Oz. Strawberry Flavor	4.00	1.00
65		1	Gal. Raspberry		20.00
65		2	Lbs. Minci Pardi	1.50	3.00
65		1	Lbs. Heavy Wine Oil		4.00
66		¼	Gal. Caramel Color	1.06	.53
66		1	Gal. Pineapple Papaya		2.50
66		5	Gal. Root Beer Oil	6.00 lb.	215.00

Page	Item No.					
67		2	Lbs. Red Color No. 2	4.85		9.70
67		1	Gal. Raspberry Extract			20.00
67		175	Lbs. Pectin	1.27		222.25
67		1½	Gal. Vanilla Flavor	11.00	lb.	132.00
68		½	Gal. Sloe Gin Color	4.00	lb.	16.00
68		3	Gal. Strawberry Color	2.00	lb.	48.00
68		1¾	Gal. Oil of Lime Distilled	8.00	lb.	112.00
68		1 qt.	Almond Flavor	2.75	lb.	5.50
69		3 qt.	Lemon Extract Terp.	2.65	lb.	11.40
69		3 qt.	True Blackberry Cone	22.50	gal.	16.20
70		2 gal.	Caramel Color	1.22		2.44
70		12	Corn Syrup	23.00		276.00
70		20 gal.	Grape Flavor XX	6.65		133.00
70		165 gal.	Caramel Color	1.22		201.30
70		1 gal.	Hypro			1.50
70		16 bt.	Hydro Clorie Acid			134.40
71		75 lb.	Menthol Sylicilate			28.50
71		8 gal.	West Disinfectant	3.50		28.00
71		10 gal.	Apple Juice	.75		7.50
71		1 gal.	Glycerine			1.20
72		35 lbs.	Kelite Alklor	.12		4.20
73	M 92	796 gal.	Liquid Sugar (No. 6368)	.08148		536.06
73	M353W	578 gal.	White Grape Concentrate	2.84		1641.52
73	M354	3000 gal.	Red Grape Concentrate	2.27		6810.00
74		2 bbl.	Red Grape Concentrate (100 Gal.)	2.27		227.00
75	S 22	1 case	12 oz. Bottles Screw Top (24)	4.83	Gr.	.80
75	S 61	3239	Cases of 12 (270 Gr.) Screw Top	7.77	Gr.	2097.90
77	S 3	49	Cases of 7200 Bottle Caps (352800)	2.41	M.	850.25
77	S 7	8	Cases of 7200 Bottle Caps (YD) (57600)	2.41	M.	138.81

Page	Item No.				
78	S 26	1	Cases of 7200 Coca Cola	2.41 M.	16.87
79	A 1	19	Y D Lites, Hanging Type	3.63	68.97
79	A 3	13	Y D Neon Elect. Clocks	35.00	455.00
81	S 24	28	Pks. Paper Napkins 250 s	1.95	13.65
81	S 32	144	Black Pails 5 Gal.	.7815	112.54
81	S 37		Lot Rubber Hall Runner		9.00
81	S 38		Lot New Conduit		12.00
81	S 39	2	Rolls ½" Mesh Wire		15.00
81	S 40	1	Rolls Rubber Mat		2.00
82	S 43	21	New V Belts	1.25	26.25
82	S 53		Lot Steel Stock, etc.		100.00
82	S 54		Lot Galv. Pipe, etc.		250.00
83	S 57	1	Roll ½ x .02 Strapping		9.00
83	S 62		Filter Paper		.76
83	S 63		Roll Wrapping Paper		8.50
83	S 66	3	Wood Kegs	.93	2.79
83	S 67	90	Filter Disks		2.70
					$15,488.99

Errors in Addition:

Page	Inventory	Should be
9	1,353.00	1,218.00
57	33,437.48	30,115.62
58	130.10	126.39
67	2,008.88	2,006.28

Shortage	3,463.17
Grand Total	$18,952.16

The Referee: Was this made up by the Receiver?

Mr. Katz: Yes.

Mr. Gendel: Mr. Yates tells me they used the shortage claim sheet as prepared by Wil-Rud Corporation and prepared it from that sheet, eliminating a couple of items which they felt were not proper.

Mr. Katz: Just a moment. The Receiver and the purchaser sat down with the inventory and made a verified physical check as between the items which were on hand and the items which were listed on the inventory. Is that correct?

Mr. Gendel: That is the exhibit that is now before the Court.

Mr. Katz: No. Just a moment. Mr. Yates, suppose you take the stand. We will try to get some facts before the Court.

RALPH J. YATES

called as a witness on behalf of the Petitioner, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Katz:

Q. Mr. Yates, you are employed by the Receiver in this proceeding, Mr. Lynch, is that correct?

A. That is correct. [10]

Q. Shortly after the sale in these proceedings you met with the successful purchaser, did you not, and began checking out the items to the purchaser?

(Testimony of Ralph J. Yates.)

A. I met with the purchaser and arranged for the representative of Mr. Lynch to check with the representative of the purchaser.

Q. Who is that representative?

A. I don't know his last name. Mr. Rudolph can give it to you.

Q. Was it Keenan? A. I mean your man.

Q. Who was your man? A. Steve Beatty.

Q. Is he here?

A. No, he isn't, but I checked the findings of both representative at the conclusion.

Q. You have a physical inventory, did you not, of the various assets of the debtor corporation?

A. We had an inventory presented to us that was taken as of July 28.

Q. There had been certain changes made in that inventory subsequent to July 28?

A. There had been sales made.

Q. The sales were taken from the inventory, were they not?

A. They were on the final inventory. In other words, [11] they used sugar and they sold some grape concentrates and sold some supplies in the operation of the business.

Q. You prepared a final inventory which eliminated the items that had been sold, is that right?

A. I prepared an inventory which corresponded with the check-out record of the Receiver and the purchaser.

(Testimony of Ralph J. Yates.)

Q. Where is that inventory which you prepared?

A. That is the inventory marked Exhibit 1.

The Referee: This one (indicating)?

The Witness: That is correct.

Q. (By Mr. Katz): What did you check against when you were ascertaining what the shortages were? Did you have an inventory to check against?

A. The physical count with the original inventory as of July 28.

Q. Where is that physical inventory of July 28?

A. It is on your desk.

Q. In order to determine what went to the purchaser and what did not, you took an actual physical check and you compared it with the inventory which I now show you, is that correct?

A. That is correct.

Q. Then you determined that certain items were short, is that right?

A. I checked the findings of the Receiver's representative with the findings of the purchaser's representative [12] and prepared this statement, and we agree on the statement in so far as the figures are concerned and the amount.

Q. Before Mr. Rudolph purchased or made any bid in this case, do you know whether the inventory of July 28, 1947 was handed to him?

A. Yes, it was.

Q. You handed it to Mr. Rudolph?

A. I did.

(Testimony of Ralph J. Yates.)

Q. Do you remember the date that you handed it to Mr. Rudolph?

A. About ten days before the first bidding. There were two meetings of the bidding.

Q. Who asked you to hand this inventory to Mr. Rudolph before he made any bids?

A. Mr. Rudolph, and Mr. Blum was with Mr. Rudolph.

Q. Have you handed this inventory to any of the other bidders? A. I had.

Q. And the instrument which I show you is a copy of the inventory which you handed to Mr. Rudolph some time before he started making the bids, is that right?

A. It is the same one I handed to him.

Mr. Katz: I would like to have this marked as an exhibit, the inventory.

The Referee: All right. [13]

Mr. Katz: That is all at this time.

(The inventory was marked Petitioner's Exhibit 2.)

Q. (By The Referee): This shortage sheet shows a shortage of $18,952.16, is that right?

A. That is correct, as compared with the inventory as of July 28.

Q. In other words, that $18,952.16 represents what you had sold?

A. Not what Mr. Lynch had sold, your Honor, but about three days after the inventory had been

(Testimony of Ralph J. Yates.)

taken there was about $8000 of grape concentrates that were sold by the Debtor. Mr. Lynch did not take possession until the latter part of August. That was short. Most of the items—As a matter of fact, all of those items, I would say ninety-five per cent of them, were short. The same shortages existed at the time Mr. Lynch took over.

Cross-Examination

By Mr. Gendel:

Q. Mr. Yates, when you handed this original or copy of the original inventory to Mr. Rudolph, did you have any conversation with him at or about that time concerning the sale of concentrates?

A. Yes, I believe I told him that we had a market price on the concentrates of about eight-five cents a [14] gallon.

Q. Did you tell him whether any had been already sold?

Mr. Katz: I object to that as leading and suggestive.

The Referee: Yes, I think that is so. Ask him what he told him, if anything.

Mr. Gendel: They put Mr. Yates on as their witness, your Honor, and I am cross-examining him. Maybe it is slightly leading, but I want to get the facts here.

The Referee: All right, go ahead.

Q. (By Mr. Gendel): What was the subject matter of your conversation, if any, with Mr. Ru-

(Testimony of Ralph J. Yates.)

dolph at or about the time you handed him Exhibit 2 concerning the concentrates?

A. I told Mr. Rudolph that we had not taken a physical inventory, that Mr. Lynch had been operating the business and the Debtor had been operating the business since July 28, and naturally there would be adjustments on the merchandise that had been used in connection with the operation of the business. I don't recall at this time any specific items that I mentioned.

Q. This column that you prepared entitled "Shortages," that is actually a difference in the items that were reflected on the inventory and the items that were offered or delivered to the Wil-Rud Corporation, is that it?

A. That is correct. It ties in with the physical check of the representative of the Receiver and the representative [15] of the purchaser.

Q. Added to those items are some additional mistakes that somebody made who prepared the original copy of July 28, is that correct?

A. That is correct.

Mr. Gendel: That is all.

Mr. Katz: That is all, Mr. Yates. Now that we have the physical background before the Court, your Honor, the bidding was done in a rather chaotic way as I remember. A reading of the transcript will reflect the cardinal facts. At page 3, line 19 of the transcript is the bid which was the original basis for all other bidding:

"The undersigned proposes to pay for all of the outstanding shares of Yankee Doodle Root Beer Company, and for the physical assets of California Associated Products, subject to the following exceptions, the sum of $135,000. In addition to the foregoing, we are to receive all trade names, trademarks, all formulas, and registered trade styles, and the lessee's interest in the lease, . . ."

Then we go down to line 18, and here it is very clear what is excepted:

"We are not to receive any of the merchandise held by the Bank of America as security for its pledge or any items held at Fresno to secure two pledges of firms located there. Nor are we to receive the cash on hand, [16] accounts or notes receivable, or deposits made by those corporations."

That is the Miller bid.

"We will take over the existing insurance on a pro rata basis. Title to all property delivered to us is to be free and clear except the water softener."

Your Honor will note there isn't the slightest exclusion of any kind excepting the items which are specifically excluded in the bid itself.

"We are not to receive any of the merchandise held by the Bank of America as security for its pledge or any items held at Fresno to secure two pledges of firms located there. Nor are we to receive the cash on hand, accounts or notes receivable, or deposits made by those corporations. We will take over the existing insurance on a pro rata

basis. Title to all property delivered to us is to be free and clear except the water softener."

Then we go on to page 5, completing that bid.

"A check for $10,000 is tendered herewith as evidence of good faith. Confirmation of the sale is to take place on or about October 20, 1947."

After that bid was read, the bidding began, not on the basis of what Mr. Gendel said at page 22 after bidding was completed. Your Honor requested that the bids be made on the basis outlined in the Miller bid so it would be possible to compare them and possible for the creditors [17] and your Honor to evaluate which bid was the better bid and which bid was not.

A problem arose with respect to the lease and what was meant by the clause in the Miller bid which said "The lessee's interest in the lease." And instead of continuing to bid strictly on a basis of the Miller bid, it was understood with respect to the lease that the purchasers were not to receive any warranty of any kind from the debtor corporation, but the purchasers were to receive such equity, if any, as the estate might have in the lease, and in addition if the officers of the debtor corporation had any understanding concerning that lease it was to be the determination of this Court that such understandings which they held they held as resulting trustees for the benefit of the purchasers.

It was not until after bidding was completed and after we had bid $161,000 that Mr. Gendel begins his statement at page 20 which he read to the

Court. Bear in mind, your Honor, in his own statement there he does not say there will be no pro rata adjustment to the purchaser. He says they are selling the inventory as is. All of us are not children. We know what inventory as is means. It means you are not warranting its quality, you are not warranting its condition. However, I have never heard of a time when a purchaser was not entitled at least to a check as to the amount and as to extension. [18]

While I do not practice here as much as I would like to, nevertheless, during some twenty-five years of practice here I have never heard it said that a receiver or trustee when selling assets does not at least give you a verification as to the quantitative count. When you buy as is, it means you take it in its state, but it does not mean if you agree to pay $161,000 you don't get what is coming to you. Taking the logic of Mr. Gendel's argument, if there was nothing on hand on October 15, 1947, then we would be paying $161,000 for nothing—says Mr. Gendel. How do you accept his compromise without going to the logical conclusion I just advanced? He says whatever was on hand on October 15. If there was nothing on hand on October 15 we still would pay $161,000?

The Referee: As is means what was there at that moment.

Mr. Gendel: That is what it means, Judge.

The Referee: As is now means what is right there now.

Mr. Katz: All he says is this, your Honor,—not as is now—let's read paragraph 1 of the order which says:

"The Receiver, by this order, is deemed to have sold, and does sell to the buyer, all machinery, fixtures, equipment, all inventory, all lessee's improvements, all furnishings, all supplies, and all finished and unfinished products of every class and character and description whatsoever located at 3631 Union Pacific Avenue, Los Angeles, [19] California, together with all the other physical assets of the debtor corporation, wheresoever situated, and together with all of the physical assets of every class and character of the Yankee Doodle Root Beer Company, a corporation, as of October 15, 1947, . . ."

That "as is" was simply the date when possession was to be delivered to the purchaser. But in the bid which we were bidding in open court there isn't the slightest, not the slightest suggestion of any cut-off date with respect to quantitative count. The only cut-off date is the date on which we are to take possession and the transaction is to be closed; we are to get the assets wherever they are situated, that is, of the debtor corporation. There is no statement as of on hand on October 15, 1947. How can we accept the argument of Mr. Gendel: If there was nothing on hand, according to his theory, we would have paid $161,000 for nothing?

The Referee: No, I couldn't follow along with that.

Mr. Katz: If you want to follow with that theory then we cannot take the first step, because if we take the first step we must take the second.

The Referee: A man must get what he bargains for.

Mr. Katz: Then let's go on with the order itself and look at the equities in this thing. I have read the bid on which Mr. Rudolph made his offers. Mr. Gendel, for the first time after bidding is completed, read in [20] a number of exceptions which were not included in the Miller bid.

Mr. Gendel: I don't think you know the record when you say that, Mr. Katz.

Mr. Katz: If I don't know the record I can't read English. I am reading from the transcript.

Mr. Gendel: Then you can't read English. Start reading at page 5, at the bottom, before you made any bid on behalf of the Wil-Rud Corporation or any one else. That is where your exceptions are stated.

Mr. Katz: The bid that was made by my client was made precisely on the basis that this transcript shows and not on the basis of your attempt to vary the proposal as made by Mr. Miller as against which we were bidding. So that your Honor will not become confused as I have become confused, the Miller bid is found in the transcript of the hearing in re sale held on October 15, 1947, from pages 3 through 5, beginning on line 19 of page 3.

Does your Honor have it?

The Referee: I have it.

Mr. Katz (Reading): "The undersigned proposes to pay for all of the outstanding shares of Yankee Doodle Root Beer Company, and for the physical assets of California Associated Products, subject to the following exceptions, the sum of $135,000. In addition to the foregoing, we are to receive all trade names, trademarks, all formulas, and [21] registered trade styles, and the lessee's interest in the lease. We are not to receive any of the merchandise held by the Bank of America as security for its pledge or any items held at Fresno to secure two pledges of firms located there. Nor are we to receive the cash on hand, accounts or notes receivable, or deposits made by those corporations. We will take over the existing insurance on a pro rata basis. Title to all property delivered to us is to be free and clear except the water softener. A check for $10,000 is tendered herewith as evidence of good faith. Confirmation of the sale is to take place on or about October 20, 1947."

That is the bid. Mr. Gendel attempts to make a statement of qualification, and he says, "The last item we would like to retain, unless the bid is increased by a comparable amount, . . ." And we increased the bid from $135,000 to $161,000.

(Reading further): ". . . would be such rights as belong to the estate arising from the payment of life insurance by the debtor corporation on the lives of Thompson and Greene."

Your Honor then calls the attention of the parties to a petition in reclamation. Then we go on——

Mr. Gendel: Don't you think it would be well to read this to the Court, "I thought it well to point out those problems to the prospective bidders, your Honor, so [22] that there wouldn't be any confusion after the highest bid is accepted."

Mr. Katz: Did you make any statement that if there were any individual shortages in any statement anywhere—just answer that yes or no—if there were any individual shortages, that the purchaser would still have to pay $161,000? Do you find that in the transcript?

Mr. Gendel: It wasn't necessary because the Miller offer says existing assets and not non-existent physical assets.

Mr. Katz: Will you answer that question? Mr. Reporter, will you read it back to him. You have asked if I read the transcript carefully.

(Whereupon the pending question was read by the reporter.)

Mr. Katz: Let's look at page 9, where Mr. Katz says, "We are prepared to bid, Judge Dickson, on the same basis as I have just actually asked so we know what we are talking about. If Mr. Levinson would indicate exactly whose bid it is, we intend to bid on the same basis as the bid that he labels so that we know what we are talking about.

"The Referee: I understood him to mention a Mr. Miller. It was a creditors' committee bidder.

"Mr. Katz: We are prepared to bid on the basis of that bid and bid higher."

Then we go to line 23: "Mr. Katz: So there is no [23] question, do I understand that the bidding now is on the basis of a sale by the Receiver pursuant to his equity power to sell the assets as distinguished from any plan?

"The Referee: That is the way I understand it."

We then bid $137,500. There is nothing, nothing in this order, which if fairly construed, requires any change in what is the general principle of equity, and that is this, that a man is entitled to what his seller purports to sell to him. Mr. Yates testified he showed Mr. Rudolph this inventory and he told Mr. Rudolph there would be some adjustment. If the inventory had no place in this proceeding at all there would have been no reason for having an inventory, it never would have been shown to us, and there would have been no reason for Mr. Gendel to have made reference to the inventory that he made on page 20.

Mr. Gendel: That is not the same inventory.

Mr. Katz: May I be permitted to continue?

The Referee: Yes. Let's not interrupt. Let each speaker finish.

Mr. Katz: Line 21. If Mr. Gendel was talking about inventory of machinery I think he should have said so. We paid $161,000 for these assets. All Mr. Gendel was seeking to obtain was that if he was to be permitted to exclude the life insurance and to exclude the $4300 item that we agreed could be excluded, he wanted to be sure the bid that was

received was at least an amount above $135 and in a sum [24] which cancelled out those rejections, and we paid $26,000 more.

I would simply like to say to the Court that there is nothing in this order confirming the sale, and I as one of the persons who participated in drafting it never dreamed for one moment that there was anything in the order that would block out the equitable proposition existing which says that every time a person buys something and checks it over, the thing's bought, nothing which would prevent us from coming in after that and asking what was rightfully due us. The exceptions were only those contended for in the bid of Mr. Miller. Those were the items at the Bank of America and the items at Fresno. The date of October 15, 1947 was the date for the surrender of possession to us of those assets.

Now, I would like to put Mr. Rudolph on the stand and get his conversation with Mr. Yates so that the Court may have the balance of that background.

The Referee: All right. [25]

SAM RUDOLPH

called as a witness on his own behalf, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Katz:

Q. Mr. Rudolph, you are connected with the

(Testimony of Sam Rudolph.)

Wil-Rud Corporation, the purchaser in this proceeding? A. I am.

Q. About ten days before you made any bid in this proceeding did you go down to the place of business of the California Associated Products Company? A. I did.

Q. At that time were you handed an inventory by the representative of the Receiver?

A. That is right.

Q. Were you able simply by going through the plant, for instance, to determine whether the quantity of concentrates on hand in the premises was actually the same amount which was shown on your inventory?

A. There was no way to tell at all. They handed me the inventory and told me that was there and the only thing that was sold out of the inventory was some Monterey grape juice, or something, to a party by the name of Briggs. That was the only thing that they told me was sold.

Q. In your claim for shortages, did you make any [26] claim for any item like that Briggs Monterey situation? A. No, sir, I did not.

Q. All you were told was sold was this one item?

A. That is correct, sir.

Q. By simply looking at the plant were you able to determine whether there were eight thousand gallons of grape concentrate as distinguished from five thousand gallons?

A. I think Mr. Yates did mention that there

(Testimony of Sam Rudolph.)

was 8000 because when I checked this inventory he told me, "Sam, I think one mistake is on that eight thousand that was supposed to be there when we took this stock over." We took for granted an inventory taken by the Receiver or Trustee is always correct and we have bought goods for the last twenty-five or thirty years and we don't do a lot of checking when we go in and look at an inventory because we know when they check an inventory it is correct. They do make allowances when they are short or over. The reason we didn't pay the balance of the $161,000, we wanted to check and see if they were going to make good. We checked it once and they were dissatisfied and we had another man go over and make the second check.

Q. Who checked the second time?

A. It was checked by the Receiver's man twice. They thought there was something wrong and they rechecked it again. Not only that, but they pointed out it was short and [27] they would make it good.

Q. Who said that? A. Mr. Yates.

Mr. Gendel: I move that be stricken, your Honor. I don't see how Mr. Yates could bind the Receiver in this case.

The Referee: No, he couldn't bind him, but I have an old-fashioned idea that a man should not be led into a false position by anybody's representative.

Mr. Katz: That is all.

(Testimony of Sam Rudolph.)

Cross-Examination

By Mr. Gendel:

Q. You talked to a gentleman at the place of business by the name of Stuckwich when you first went out there? A. Yes.

Q. Did you have any conversation with him concerning the inventory?

A. The only thing he had Yates——

Q. Did you have any conversation with him?

A. Well, I don't know whether I did or not with respect to inventory, but Mr. Stuckwich told me the same thing, that there was some Monterey grape juice that was sold.

Q. Is that all that Mr. Stuckwich told you [28] with reference to the items in the plant compared to the original inventory? A. That is corect, sir.

Q. Did Mr. Stuckwich tell you in substance that this business had been operated by the Debtor after the inventory was taken and had been operated by the Receiver after the inventory was taken?

A. I didn't know it.

Q. Did he say anything about that to you?

A. I didn't know anybody was in there before Mr. Lynch went in there. There was nothing discussed about that at all.

Q. Was there anything said to you by Mr. Stuckwich?

A. There was nothing said by Mr. Stuckwich because I don't think I had five minutes conversation with Mr. Stuckwich.

Q. Isn't it true Mr. Stuckwich told you this

(Testimony of Sam Rudolph.)

inventory, referred to as Respondent's Exhibit 2, was the inventory taken when the Debtor proceedings commenced on July 28, and that those items as set forth on the inventory were not all there because there had been operations by the Debtor and the Receiver?

A. No such statement was made to me by Mr. Stuckwich.

Q. What is it you say Mr. Yates told you about the shortages?

A. Mr. Yates did not say anything about shortages. He said, "You understand that they sold the Monterey grape juice." In going through the plant there was a lot of cases of grape juice.

Q. I just asked what he said to you.

A. I am telling you.

Q. About the subject matter of shortages.

A. The only thing he told me was sold at that time was the Monterey grape juice.

Q. That is all Mr. Yates told you?

A. Yes.

Q. Prior to the time the bid was made on October 15? A. That is correct, sir.

Q. You did not have any conversation with Mr. Yates about anything being made good or——

Mr. Katz: That is after?

Q. (By Mr. Gendel): Prior to October 15?

A. That is correct.

Q. Now, let's get to the conversation after October 15. When did that take place?

(Testimony of Sam Rudolph.)

A. It probably took place the next day after the sale was confirmed.

Q. Your recollection is you had a conversation with Mr. Yates on the 16th concerning shortages?

A. Yes, sir.

Q. Where did the conversation take place?

A. At the plant. [30]

Q. Who was present?

A. Who was present? I think Mr. Stuckwich was in the office and Mr. Smith at the time when it was pointed out to me the shortages.

Q. What did Mr. Yates say with reference to the subject matter of making good?

A. I never said anything about him making good at all. I didn't make any such statement about him making good. We were just checking the inventory at the time.

Q. I see.

A. Don't misunderstand. He didn't say he would make anything good.

Q. He didn't say the Receiver would make anything good, did he?

A. He said, "We were going to check it."

Q. All he said, "We are going to check out the inventory," is that it? A. That is correct.

Mr. Gendel: That is all. I don't know whether your Honor desires any further testimony. Mr. Lynch is trying to locate Mr. Stuckwich, but from this clarification of the direct testimony I doubt whether we need it. I would like to point out to the

Court that the bid of the Miller group was for the physical assets of California Associated Products. Mr. Katz referred to his twenty-five years of practice. I appreciate that is twenty-five years more or less [31] and therefore feel that with that experience and background he would be perfectly capable of drawing up an order if this proposed order was not proper. This was all he had to do: "All of those physical assets as contained in the inventory" or "As per inventory," just those three or four words, if they were buying pursuant to any inventory. Why use the language as approved by Mr. Katz, "The physical assets as of October 15, 1947 at 5:00 o'clock p.m."? We knew the order could not be submitted to your Honor on the 15th. As a matter of fact, we were still working on this order on maybe the 21st or 22nd of October. Therefore, that was the upset date and if anything disappeared between five o'clock on the 15th and the time your Honor confirmed the order, or any subsequent time when possession was tendered, then there would have to be an adjustment. That is the upset date.

I can't see any merit to the contention that if we sold them nothing they would have to pay $161,000. We sold them what was there on October 15. They had an opportunity to make an examination. If it would be of any assistance to the Court, Mr. Miller is here. He is the one making the bid. I feel his writing speaks for itself, but he offers to testify he was bidding on what was there on the

15th. I don't think that is necessary, nor would it be binding on the Court.

The Referee: No, I don't think it is binding on the [32] Court.

Mr. Gendel: I feel the record is clear, that the situation with reference to checking out the inventory is an after-thought. I am satisfied if there were items out there that were not on the inventory in a substantial amount over and above, they would not have been turned back to us and not a word would have been said about the inventory. I cannot feel there is any inequity in the position of the Receiver. I pointed out what the Receiver did concerning the insurance and the free and clear sale of the subsidiary corporation. I think the Receiver has been eminently fair and that the order of sale as approved by counsel and approved by the Court should be binding on the purchaser.

Mr. Katz: Will Your Honor turn to page 23 of the transcript, line 4, as to what was meant by the as is clause. This is the Receiver speaking:

"Mr. Lynch: The bidder will take this business over as of what date, and will continue to operate, and what will happen to the profits, if any, that are derived from the operation of this business?

"Mr. Gendel: Mr. Katz, do you want it tonight?

"Mr. Katz: I think we want to get the order."

They were talking about what date the bidder wanted to take the business over, and that is the date of October 15, 1947. It is impossible to read the transcript [33] any other way. Mr. Lynch asks,

"The bidder will take this business over as of what date"? Now, if there was no inventory to be concerned with in this proceeding, if all we were to get was what was on hand there, then why would the Receiver check it out? What difference would it make? Why would they verify? Why would we be handed an inventory if it meant nothing? Mr. Rudolph could see and any person could see—either the Receiver hands an inventory to a person indicating that he wants to sell something based on the inventory or he hands him nothing.

With respect to the question of the fact that they excluded the proceeds of the sale, that is correct. They kept the cash on hand. We did not make any claim for cash on hand. They kept the cash on hand and we would get the pro rate for shortages. We couldn't get both.

When you read the Miller bid you will find they excepted the cash on hand expressly. True, there were sales, so the Receiver keeps his cash, but that doesn't mean the purchaser does not at least get a pro rate which isn't equal to the cash—he obviously got one hundred cents on the dollar—and in this case the pro rate runs something a little less than forty cents on the dollar. I have the figures somewhere.

The assets are $415,000, and we pay $161,000. The pro rate would be something less than forty cents on the dollar. [34]

Frankly, Judge, I am not concerned about all items, but certain large items, it seems to me, in

equity and good practice, we should not be required to pay for. For instance, take the shortage of 3000 gallons of grape concentrate instead of 8000 gallons.

The Referee: Where is that?

Mr. Katz: The item $6,810.

The Referee: I see that.

Mr. Katz: And the other large items: The 3,339 cases of glass bottles. Bear in mind the Creditors' Committee came in and recommended $135,000 and wanted it confirmed, and it was only the insistence of the Court that the matter be opened up for competitive bidding and that we were given a chance to bid and we bid $26,000 more than that man.

The Referee: If you are entitled to this rebate or to these payments, then why aren't you interested in all of the items?

Mr. Katz: I am interested in all of the items, Your Honor.

The Referee: If you are entitled to any of them you are entitled to all of them.

Mr. Katz: I wanted to point out the larger items which would indicate the impropriety of the contention that the inventory meant nothing.

The Referee: I am not interested in that. They wouldn't [35] give you a great long document or even make it up if they didn't expect you to rely on it. Is there any question between you gentlemen as to the amount of the shortage. As I have it here, it amounts to $18,952.16.

Mr. Gendel: I presume as moving party we are

entitled to a closing statement, if I may be permitted to make it.

The Referee: Oh, certainly.

Mr. Gendel: I would like to make this statement to the Court. The physical inventory taken on July 28, as I understand it, was taken by the Union Appraisal Company which would show what assets the Debtor was coming into Court with. That can be checked. Now, when the Receiver comes into possession he is charged with these assets. It is natural when he turns assets over to a buyer that he would require his man to check out those items so that he in turn can get a receipt for what he turns over—the other items being those items which were sold.

If counsel for Wil-Rud Corporation admits that he knew there were certain items of cash from sales, then he must have known from that very fact that there were sales. Certainly if we had sold a sizable amount of these assets before any bids were made or undertaken and the money was yet to come in—assuming we sold $50,000 worth, is there any substance to the contention that because the $50,000 worth of items were on this July 28 inventory and were not at the plant at the time Mr. Rudolph or any one else went [36] out to look at them, that nevertheless if the estate got it they would have to make a pro rata reduction for it? If so, then there was no purpose for the Receiver operating the business for profit or liquidation; then we were going to give the buyer all of the benefit of his operations

without any charges, et cetera. That doesn't sound reasonable to me. If they thought they were buying as per inventory, then a precaution should be taken by inserting that in the order. I can't see any justification in this particular type of sale, which is difference than the usual auction sale made directly off of the inventory and handed to bidders in court to check, but this was not an auction sale; this was a sale of a going business with interested parties who knew what was going on in the business and were buying the business as is and where is at that time.

They want an adjustment in mistakes in addition contained on various pages. Why don't we give them an adjustment on the fact this shows $768,-344.83 worth of value. That is what the inventory shows. That is the exhibit before the Court. That is how ridiculous this argument is that we are obligated to give them an adjustment of items sold prior to the time that they even saw the place or figured out their bid or made their bid. I don't think there is any fairness to this afterthought.

As far as the Receiver is concerned, he is guided by the order of court as originally made and as far [37] as I am able to ascertain from anything said today we have complied with it. We tendered to Wil-Rud Corporation all of those assets which were in the possession of the Receiver as of October 15 at five o'clock p.m. We are not in a position, as I see it, on behalf of the estate, to give to the Wil-Rud Corporation the benefit of those sales which we

made for the estate prior to the date that this sale was made in this court. There has been nothing shown that Mr. Rudolph—who is an experienced purchaser, perhaps more so than any of us—when the inventory dated July 28 was given to him was sincerely relying upon that inventory when he was bidding in open court on October 15, 1947, having been in court and known about the operations and all the rest of it, to me that is not a justifiable act of equity on behalf of this Bankruptcy Court. In effect, it would be giving to the purchaser moneys sorely needed in an attempt to make a dividend payment to creditors. The question of adjustment on mathematical errors, as Mr. Lynch points out in his good handwriting, indicates how far they are reaching. Just because somebody made a mistake in adding up forty-seven thousand odd dollars they want an adjustment on that phase of it. There is no equity in their position and I don't think the estate should be burdened with an adjustment.

The Referee: Is there an agreement that there is a shortage of $18,000? [38]

Mr. Gendel: The shortage is a physical shortage of $15,000 and some dollars on Exhibit 1.

The Referee: $15,488.99 and then errors in addition.

Mr. Gendel: Yes. Those are the mathematical errors I was talking about, nothing but errors in addition and subtraction. Whoever made up the July 28 inventory did not add or subtract properly, whatever it was. There was some mistake there.

Mr. Katz: Counsel's statement about the inventory being $768,000 and why didn't we look to that as the amount we were asking is just nonsense, Judge Dickson, because the bid of the bidder on which we were making the bid: "We are not to receive any of the merchandise held by the Bank of America as security for its pledge or any items held at Fresno to secure two pledges of firms located there." Therefore, when you subtract that from the $768,000 you come to the figure which I have given to the Court, which is some $415,335. So let's not try to make an absurd position. It is perfectly simple and clear.

Now, as to the operation of the business for months and months, Mr. Rudolph knows nothing about that. He was handed an inventory, not months and months before he made his bid, but just before he came into court.

I say it is the duty of the Receiver in a case like that to say, "Don't look at that inventory." What did he show it to him for? But he was handed the inventory. [39] We are not making a protest against the good faith of Mr. Lynch, but we don't want him to make a protest against our good faith. We came into open court and paid $161,000 for the assets. There wasn't the slightest suggestion in the transcript of the record which would not indicate that the ordinary adjustment between purchaser and seller in this kind of a transaction would not take place, something which takes place every

day when shortages develop. They are made every day and we think they should be made here.

The Referee: I am very much inclined to agree with you. I think a man ought to get what he buys, should get what he bids for. If he doesn't get it, he should not pay for it. You may prepare an order, Mr. Katz, to that effect.

Mr. Katz: There remains the problem, Mr. Gendel, which you and I should work out on the assets being turned over to us. I am talking about the bottles we never received. Do you want to discuss that?

Mr. Gendel: I think it should be discussed because we are apparently going to have some litigation on the matter.

Mr. Katz: I think we can reach a stipulation on the facts without taking the Court's time and then submit the question to the Court. Would you like to do that? I think Mr. Lynch and Mr. Rudolph can reach an agreement on what the facts are. [40]

Mr. Gendel: I don't even know what the problem is. If we can stipulate to save the Court time and properly present the facts, we will be glad to do it.

The Referee: Yes, let's do that.

Mr. Katz: I will prepare an order on this phase of it. On the other phase, let's put it over, say, about a week and see if we can get together.

Mr. Gendel: I don't know what it is about. There is nothing on the calendar.

Mr. Katz: Your order simply is to compel us to pay.

Mr. Gendel: That is right.

Mr. Katz: You say you have tendered the assets to us. Well, we want to pay you, but the order says we are to get the assets wheresoever situated.

Mr. Gendel: That is as of October 15.

Mr. Katz: Now, what happened was this. The Debtor had delivered various cases containing bottles, empty bottles or filled bottles of root beer. The customers and the storekeepers who had those cases had paid the Debtor, I think, sixty cents a case. We are entitled to those cases and we would like to get those cases from the customers.

Mr. Gendel: Are they shown as shortages on Exhibit 1?

Mr. Katz: They aren't short. They are in the possession of third parties.

The Referee: You gentlemen get together on a stipulation [41] of facts, if you can.

Mr. Katz: All right. Otherwise, we will bring on a separate proceeding.

Mr. Gendel: Correct. May we have proposed findings and conclusions and the order submitted to us so that we will have an opportunity to make suggested changes?

The Referee: Yes. I will hold it for five days.

State of California,
County of Los Angeles—ss.

I, Byron Oyler, Official Court Reporter, do hereby

certify that the foregoing forty-two (42) pages comprise a true and correct transcript of the testimony given in the above entitled matter.

Dated this tenth day of February, 1948.

/s/ BYRON OYLER,
Official Court Reporter.

[Endorsed]: Filed April 13, 1948. [43]

[Title of District Court and Cause.]

HEARING RE PETITION TO COMPROMISE AND SALE OF ACCOUNTS RECEIVABLE

The following is a stenographic transcript of the proceedings had in the above entitled cause, which came on for hearing before the Honorable Hugh L. Dickson, Referee in Bankruptcy, at his courtroom, 343 Federal Building, Los Angeles, California, at ten o'clock a.m., Thursday, January 29, 1948.

Appearances:

GENDEL and CHICHESTER,
By MARTIN GENDEL, ESQ.,
appearing on behalf of the Receiver, E. A. Lynch.

CHARLES J. KATZ, ESQ.,
appearing on behalf of Wil-Rud Corporation.

AARON LEVINSON, ESQ.,
appearing on behalf of Certain Creditors.

OVERTON, SELIG and WILSON,
By FRANK T. COTTER, ESQ.,
appearing on behalf of F. W. Boltz.

NATHAN E. GILLIN, ESQ.,
appearing on behalf of Yankee Doodle Root Beer Bottling Company of San Fernando Valley, Inc.

HUGH WARD LUTZ, Esq.,
appearing on behalf of Victor Kramer.

HUGO A. STEINMEYER, ESQ.,
appearing on behalf of the Bank of America.

The Referee: California Associated Products Company.

Mr. Goodstein: I am from the office that represents one of the larger creditors and we received no notice until yesterday, and counsel who was handling this matter had to leave town.

The Referee: Can't you pinch hit for him?

Mr. Goodstein: I don't know a think about bankruptcy proceedings at all.

Mr. Levinson: My own situation is this, Your Honor. I have to return to the Superior Court where I am waiting to be assigned.

The Referee: I am going to hear this matter, gentlemen.

Mr. Levinson: May I finish, Your Honor?

The Referee: Yes, sir.

Mr. Levinson: I have arranged to be available upon receipt of a telephone call and I might have to leave any minute. This will take quite a while.

The Referee: I am going right through with it. I am not going to string these things along to suit the convenience of attorneys. It has been noticed here. If you have not been able to be present that is too bad.

Mr. Levinson: I know, Your Honor, but what does one do in a case like this when they are on trial some place else?

The Referee: Tell the judge you have to be here and wait a while. [2*]

Mr. Overton: The same thing applies to the F. W. Boltz Corporation.

The Referee: The same answer to you, sir. I am not going to string these things along just because somebody is out of town or has to be somewhere else.

Are you interested in the California Associated Products, Mr. Gendel?

Mr. Gendel: I am, Your Honor. We have two matters before the Court this morning. One matter involves a compromise and settlement with Wil-Rud Corporation. For the benefit of those interested, as is set forth in the notice, the Wil-Rud Corporation

*** Page numbering appearing at top of page of original Reporter's Transcript.**

bid in open court $161,000 for the assets of California Associated Products exclusive of certain items. The excluded items are not in dispute. After Wil-Rud Corporation had taken possession they complained to the Receiver that items which were in the original inventory taken on July 28 were not present at the plant. They worked out a master sheet showing items that were missing from the inventory and mathematical miscalculations totaling a gross amount of a little over $19,000, $19,336.86. The Receiver did not agree with the position of the purchaser and brought on an Order to Show Cause as to why the balance of the purchase price should not be paid as per the original bid. The Court held a hearing with reference to that one phase and indicated as far as the Court was concerned there would be a ruling that the [3] purchase was made relying upon the inventory and that therefore there would be an allowance on the missing items pro rata on the basis of the ratio between the purchase price and the inventory price, roughly forty cents on the dollar.

After the hearing it was discovered by the Wil-Rud Corporation that the wooden cases in which the bottles were transferred back and forth, in every instance that they could discover, had been more or less liened with each of the retail distributors or selling agencies, in the sense that the party purchasing the root beer had to give to California Associated Products sixty cents per case and that

was stamped on the inside of the cases in the possession of the retailers who were selling the product, and that they had already been confronted after taking possession, where in order to pick up cases from distributors who were not buying the product —since they needed the cases themselves—had paid out the sixty cents per case.

When that developed a conference was held between the Receiver and his representative and Wil-Rud Corporation and its attorney. We tried to figure out what might be a fair way to dispose of the problem. The Receiver was of the opinion, with due deference to the indication of the Court's ruling that the sale had not been made as per July 28 inventory and the purchaser well knew that items were being [4] continually sold since both the debtor in possession and the Receiver operated the business. However, the matter of the deposit on the cases was something that had not been brought to the attention of the Receiver and he was not aware of that factual situation at the time that the sale was announced in open court. And as a result, pursuant to both bids, the physical assets belonging to the California Associated Products Company or Yankee Doodle Root Beer Bottling Company of Los Angeles, a subsidiary, those items had been sold free and clear of any liens or encumbrances. So that as to that particular item the Receiver felt there was merit to the position of the purchaser because from a legal standpoint, if we cited in the various store people who were holding these boxes,

assuming they would refuse to assemble them, it might well be that this court of equity might say they had a possessory lien on them until the sixty cents was paid back, in all fairness to the storekeeper.

With that thought in mind, the Receiver negotiated with the purchaser and finally came up with the offer of compromise which totaled represents several thousand dollars less than the two items taken separately: One being the contested item with reference to the shortages in the inventory, forty per cent of $19,000, which would total roughly in the neighborhood of $5000 there. Then on your cases, set forth in the inventory on page 88A, if we were [5] to figure it out on a basis of the gross amount, we would have forty per cent of $47,000 which is the total capitulation on that page, or if we could take it as a deposit per case we would have sixty cents for over twenty-five thousand cases. Either way you measure it, the amount is in excess of $60,000.

The compromise as finally worked out on that item was that the purchase price would be reduced by the sum of $17,500. In other words, lumping the two claims——

Mr. Katz: 18.5.

Mr. Gendel: That is correct, it would be $18,500, leaving a balance to be paid upon the approval of this petition, if it is approved, in the sum of $17,500. In other words, we lumped approximately $16,000 on the cases and approximately $5000 on the short-

ages and we reduced that by negotiation to an adjustment of $18,500.

In connection with that adjustment, there was a discussion about accounts receivable. After having taken possession the Receiver found that the books and records of the Bankrupt, or the Debtor herein, whom we think will shortly be a bankrupt, were not properly kept. Offsets were not recorded in the regular books and records. As a matter of fact, they were not black books. I guess they were gray covered books showing offsets, but were not carried in the regular books, and the only records were $19,000 of offsets against a gross amount of $72,000 worth of accounts receivable. So we thought we had something [6] in the way of accounts receivable, but upon discovering the books and checking the matters further, it appeared that the practical value of the accounts which the California Associated Products Company had not collected up to the time of the commencement of the Debtor proceedings on the 28th of July had not been collected because there was an argument about some offset or claim. Therefore, the Receiver did not value those accounts receivable in excess of approximately $3000 in his opinion.

After some discussion, the Wil-Rud Corporation indicated that they would prefer to buy or have the accounts receivable on the basis that many of those people would continue to be their customers, and they did not want the estate trying to collect whatever might be collectible by litigation or selling

them to some agency that might turn around and sue their accounts. Because of the uncertainty of the value of the accounts receivable, we did not feel it was advisable to enter into any outright sale as part of the compromise itself because there might be a feeling on the part of interested trade creditors that there had been some suppression of facts or values, and that there had not been an opportunity for every one to bid openly on the accounts which on the face look as if they would bring maybe fifty or sixty thousand dollars if they didn't know about the offsets. We therefore brought on a petition for a return of sale. And as I said [7] before, Your Honor, we have two things before the Court this morning: The Wil-Rud Corporation has offered $3500 for the accounts receivable, as per Mr. Yates' list.

Mr. Yates: I am sorry I didn't bring the list.

Mr. Gendel: You don't have your list with you, either?

Mr. Yates: He has the master list, but I knew the figures.

Mr. Gendel: The gross amount on the accounts receivable was originally $72,000, with acknowledged offsets, reducing it by $19,000. We have reserved from those accounts receivable the claims of the estate against Messrs. Thompson, Green and Tanner and the Pacific Associated Products, California Marmalade, and also the Loma Linda account. All of the other accounts receivable which the estate now owns and which are included would

be encompassed in this proposed offer of sale. Actually the estate then, as far as liquidation is concerned, would be reduced to the particular accounts which have been reserved, and any action that might be brought against the individuals with whom we have reserved those accounts.

That is the status of the two items before Your Honor this morning. I understand there are some objections to the proposed sale.

The Referee: Let me see if I understand you. The bid was $161,000.

Mr. Gendel: Yes, Your Honor. [8]

The Referee: You propose now to reduce that by $18,500, is that correct?

Mr. Gendel: That is correct.

The Referee: That would leave $142,500.

Mr. Katz: $143,000.

Mr. Gendel: $142,500, leaving a balance of $17,500.

Mr. Katz: We paid $125,000 on account, Your Honor. The order confirming the sale provides that we are not to pay until we get delivery of the assets.

The Referee: It is proposed to pay in addition to that the balance. You have paid $125,000, you say?

Mr. Katz: That is right, Your Honor. We will pay the additional $17,500 today.

The Referee: Plus $3500 for the accounts receivable.

Mr. Katz: If there is any feeling on the part of anybody about the accounts receivable, candidly,

we are not so interested in them; they are a burden to us. But we will take them. If anybody else wants to pay an additional amount for them they can have them. Frankly, it is all right with us.

The Referee: What are the objections?

Mr. Levinson: Will the Receiver offer any testimony in support of the petition to compromise?

The Referee: I don't know. What type of testimony do you think should be introduced?

Mr. Levinson: I would like to hear some testimony with [9] regard to deposits, something more than Mr. Gendel's statement.

The Referee: Have you any person here who knows from firsthand knowledge about the people who put up sixty cents a case?

Mr. Gendel: Mr. Yates might be able to help us on that.

The Referee: Very well. Come forward, Mr. Yates.

(Witness sworn.)

Here is your witness, gentlemen.

RALPH J. YATES

called as a witness on behalf of the Trustee, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Gendel:

Q. What is your name, please?

A. Ralph Yates.

(Testimony of Ralph J. Yates.)

Q. Are you connected with Mr. Lynch, the Receiver in the operation of this estate?

A. I was by claim and order of the court.

Q. In what capacity did you act?

A. I made an investigation of the books and records and I prepared operating statements. I attempted to assist creditors and Mr. Lynch and the Court in any manner that [10] I could.

Q. Mr. Yates, you have heard the question asked with reference to the deposits on the wooden cases. Will you tell us what you found with reference to the books and records?

Mr. Katz: You refer to them as wooden cases. It is the deposits on the wooden cases and the twenty-four bottles in the cases.

Mr. Gendel: Yes.

Q. With reference to the wooden cases and the twenty-four bottles in each of the wooden cases, what did you find when you investigated the books and records?

A. May I refer to the inventory, please? This inventory was taken as of July 28. On page 88-A there appears an item representing 25,807 wooden cases and bottles. In addition to that, there were 74,640 root beer bottles, 634,708 root beer bottles. This item was set forth as alleged to be in the vicinity or territory of Los Angeles, California.

That item was estimated by the deposits that were totaled from the cards that they had out there

(Testimony of Ralph J. Yates.)

representing cases outstanding in the territory on which there was a deposit of sixty cents a case.

Apparently no issue is being made of the 74,000 and the 634,000 root beer bottles. Mr. Katz overlooked that, apparently. But on the 26,000 wood shells and [11] bottles, there is a liability of sixty cents on those which would run over $16,000. On the basis of forty cents on the shortage there would be an adjustment of $18,000 coming to Mr. Katz; and on the 20,000 shortage that has been ruled on before there would be another $8000, or $28,500. I understand he is willing to compromise for $18,500 and we are making $10,000 on that matter.

Q. My question, Mr. Yates, was primarily directed to——

Mr. Levinson: I ask that all be stricken, if Your Honor please, as not responsive to the question.

The Referee: No, it won't be stricken. We will hear the whole story. We don't strike much over here. We will hear the whole story.

Mr. Levinson: All right, Your Honor.

Q. (By Mr. Gendel): My question was directed for the moment as to how you ascertained to your own satisfaction that sixty cents per shell, as you described it, for over 25,000 shells had actually been paid over to the California Associated Products Company prior to the commencement of the debtor proceedings by the various people who had possession of the cases or shells.

(Testimony of Ralph J. Yates.)

Mr. Levinson: Just a moment. That assumes that he did ascertain.

The Referee: Objection overruled. I will hear what the facts are, regardless of technicalities. You may answer. [12]

The Witness: Here is how I ascertained it. Mr. Brill, the agent and representative of the Creditors Committee, went through the list with the inventory men, and with Mr. Tanner, and tied in with the deposit control that Mr. Tanner had, and in conjunction with these cards that they had in the offices, and on that basis they estimated the outstanding cases and shells.

Q. (By Mr. Gendel): Did you yourself see these cards? A. Yes, I saw the cards.

Q. Were there any notations on the cards reflecting the receipt of sixty cents per shell?

A. Yes.

Q. Where are those cards now?

A. They are in the office.

Q. Was there any separate books other than regular books of entry of the corporation which indicated the receipt of the moneys?

A. Not identifying these particular customers that they had a general control which as it set forth here alleged and estimated and would be very difficult for any one to reconcile.

Q. By checking the regular books and records you could not tell where the money came from or that it was to be applied on these so-called deposits, is that right? A. No.

(Testimony of Ralph J. Yates.)

Q. It was only by checking back through these special [13] what they meant, is that right?

A. That is right?

Q. That check was made after Wil-Run Corporation complained that the retail men wanted their sixty cents per shell and they wanted to pick them up?

A. No. That check was made prior to that and is set forth in an inventory here. This figure is nothing but an estimated figure on bottles that are alleged to be in the vicinity of Los Angeles.

Q. Is there anything in the inventory which reflects that these shells are subject to sixty cents per case? A. No, there isn't.

Q. You have examined the whole inventory, have you? A. That is correct.

Q. That obligation is not set forth there at all, is it? A. That is correct.

Mr. Gendel: That is all.

Cross-Examination

By Mr. Levinson:

Q. Mr. Yates, what do you know of your own knowledge as to the number of cases that are outstanding in the hands of distributors in the vicinity of Los Angeles or the City of Los Angeles? [14]

A. Of my own knowledge I don't know the exact amount.

Q. Did you assist Mr. Brill or Mr. Tanner in

(Testimony of Ralph J. Yates.)

any way in ascertaining the number of cases which were in this vicinity or in the city?

A. No. Unfortunately, this inventory was taken about forty days before I arrived on the scene.

Q. All you know is what you heard from some one else, is that right?

A. What I heard and what I tried to verify in checking back.

Q. What were you able to verify?

A. I couldn't reconcile this figure.

Q. Did you attempt to reconcile it?

A. I did.

Q. As far as you are concerned, it is somebody's guess?

A. As far as I am concerned, it is somebody's guess, and it appears to be from my examination substantially correct.

Q. On what basis, Mr. Yates? Upon what do you form the conclusion that it is substantially correct?

A. Well, I ran a tape on these so-called special cards and I accepted Tanner's deposit control figure to a certain extent. I figured it may be at least fifty per cent correct, so all I can do is just agree with the wording here: [15] They are estimated and alleged to be in this territory.

Q. The fifty per cent is merely an estimate on your part?

A. Based upon my checking his records.

Q. Have you contacted any of the distributors to find out how many cases are in their possession?

(Testimony of Ralph J. Yates.)

A. I have not.

Q. Have any distributors contacted you for the purpose of making any claims to the sixty cents on any cases?

A. They have returned cases and they have been credited with the sixty cents.

Q. You did not answer the question, Mr. Yates.

A. I probably didn't understand it.

Q. Have any distributors contacted you?

A. Personally?

Q. Yes. A. No.

Q. Do you know of any written agreement between any person in possession of any of these bottles or cases in reference to the sixty cents to be returned? A. I know of the practice.

Q. No. Please answer the question. Do you know of any written agreement?

A. No, other than the invoice itself.

Q. Where is the invoice to any of these people?

A. When the cases are delivered the sixty cents is [16] charged on the bill and if any cases are returned they are credited.

Q. Have you any bills or copies of bills?

A. Oh, yes, all of them.

Q. Where are they? A. In the office.

Mr. Levinson: I wonder if we could have them, Your Honor. I think they are very, very vital because there is a question as to whether or not these distributors have a lien.

The Witness: There are about four cabinets of them.

(Testimony of Ralph J. Yates.)

Q. (By Mr. Levinson): They are practically all alike, aren't they? A. Practically.

Q. I wonder if we could get some samples to see what they are like?

A. I am sure we can get you some.

Q. When the cases are delivered to the distributors the distributors charge so much for the cases themselves, is that right, for the number of bottles in the case? A. That is correct, plus deposit.

Q. Plus sixty cents? A. That is correct.

Q. Is there any indication on the invoice as to what the sixty cents is for? A. Yes. [17]

Q. What does it say, do you know?

A. So many cases at sixty cents a case.

Q. That is all it says on the invoices?

A. That is it, something like that.

Q. What?

A. I am not certain of the wording. I know the unit is multiplied by sixty cents.

Q. Is there any written statement anywhere to the effect that the distributor who paid the sixty cents has a lien on the case or the bottles in the case for the sixty cents?

A. I am not qualified to answer whether there is a lien.

Q. No. Is there any written statement. That is all I am asking. A. No, not that I know of.

Q. In other words, so far as you know, the only thing in writing any place is what appears on the invoice? A. And on the boxes.

(Testimony of Ralph J. Yates.)

Q. Do you know what the exact wording is on the boxes? A. I don't remember.

Q. Is the wording the same on all of the boxes?

A. I believe so.

Q. How can we get hold of one of the boxes to see what the wording is? [18]

A. I imagine bring one in.

Q. Do you know whether or not any of these distributors have filed a claim in court with the Referee in Bankruptcy for the sixty cents on any of the cases in their possession or that were in their possession?

A. Not that I know of. None that I know of.

Q. Do you know how many such distributors have those claims?

A. Well, the distributors take care of their own cases and bottles. You mean the customers?

Q. The customers, yes. How many such customers have such claims—retailers, we will call them. I have been calling them distributors.

A. Well, let's see. Oh, three or four hundred customers on the books.

Q. Have you checked to see how many customers have such claims?

A. None have filed any claims.

Q. That was not my question. Have you checked with them to see how many of them have such claims? A. No, I haven't.

Q. You have not checked with any of them to see what the amount of their claims are?

A. No. I also understand that in this arrange-

(Testimony of Ralph J. Yates.)

ment the Wil-Rud Company are to assume all bottle claims.

Q. No one knows how many claims there are or what the [19] number of those claims are?

A. No.

Q. Is that right? A. That is right.

Q. Or the amount of the claims?

A. That is right.

Q. But the Wil-Rud Company, I understand, are to relieve the Receiver of any liability on those claims, but no one knows what the amount of those claims is, is that correct?

A. Not the exact amount, no.

Q. Or the number of those claims?

A. That is correct.

Q. So far as that is concerned, both as far as the Receiver is concerned and the Wil-Rud Corporation is concerned, that is merely a cat in the bag proposition, is that true?

A. That is true. However, there is one thing that may help you. The Receiver sold to Wil-Rud $48,000 worth of assets consisting of bottles and shells.

Q. That is merely your conclusion, isn't it, Mr. Yates? A. No, it is on the inventory there.

Q. That is on the assumption that the Receiver sold on the basis of the inventory instead of as of October 15, isn't that true?

Mr. Katz: The Court already so ruled. [20]

Mr. Levinson: I think not.

(Testimony of Ralph J. Yates.)

The Witness: That is up to the Court. I am not qualified to answer that.

Mr. Katz: There was a hearing, Mr. Levinson, at which the Court so ruled.

Mr. Levinson: I was present, but I didn't think any order was entered.

Mr. Katz: We have tried to adjust this pursuant to the Court's indication.

Mr. Levinson: There was no order entered.

The Referee: I wish you would bear in mind, gentlemen, that I am not going to let anybody buy something in this court and then pay for something he doesn't get.

Mr. Levinson: I quite agree with Your Honor in that regard. No one should have to pay for anything they don't get. * * *

Q. Mr. Yates, who paid the sixty cents, the customer or the distributor, do you know?

A. The customer put up the deposit when they were delivered.

Q. To whom? A. To the store.

Q. To the store? A. Yes, the retailer.

Q. You mean the consumer?

A. The retailer. [21]

Q. To whom did the retailer pay sixty cents?

A. To the driver, if it was a cash sale, and if it wasn't a cash sale——

Q. Whose driver would that be, the distributor's driver? A. No, the bankrupt's driver.

Q. The bankrupt's driver?

(Testimony of Ralph J. Yates.)

A. Or the debtor's driver.

Q. Do you know what the amount of those sixty cent pieces is? A. Roughly, yes.

Q. Well, only by this estimate, is that right?

A. That is right.

Mr. Levinson: That is all.

Mr. Lutz: May I ask Mr. Yates a question?

The Referee: Yes. Whom do you represent?

Mr. Lutz: Victor Kramer. I am Hugh Lutz.

The Referee: Go right ahead.

Cross-Examination

By Mr. Lutz:

Q. Mr. Yates, can you tell us of these sixty cent pieces the amount paid? What amounts were cash and what amounts were credit shown on these accounts receivable item 2 in this notice?

A. Well, the accounts receivable consist principally [22] of the California Associated Products accounts receivable and that represents claims—they were offset by claims and credits issued, and subsequently erased from the books. It represents spoiled merchandise. That is practically all of the accounts receivable, the major portion. The accounts receivable that are collectible are a few items that existed during the Receiver's operation and very, very little collectible prior to that time.

Q. I believe Mr. Gendel stated there were $72,000 of accounts receivable? A. Roughly, yes.

Q. Of which he said $19,500 he knew were no good?

(Testimony of Ralph J. Yates.)

A. No. They already had $19,000 worth of credit balances entered on the books.

Q. That should have been charged against the seventy-two? A. That is right.

Q. Reducing the amount?

A. That is right.

Q. That makes it practically $52,000?

A. That is right.

Q. Of that $52,000 what part of it is not retained accounts such as Messrs. Thompson, Green and Tanner, and so forth, as shown in the notice, paragraph 2?

A. I would say offhand $25,000 belongs to the bank of America. [23]

Q. Then would you say $27,000 might represent accounts receivable from retailers or something like that, retailers and others?

A. Throughout the United States, yes. I believe that we have on record claims for more than half of them which they have already complained about, not only paying their bills, but they want a check for the credit balance due on them.

Q. What credit balances are you referring to, bottles or what?

A. Everything, bottles and juice. What happened is this. When they were preparing this petition under Chapter XI apparently—I don't know, I wouldn't say that, but they just erased, oh, about thirty or forty thousand of credit they had previously given to customers, and just increased their accounts receivable control.

(Testimony of Ralph J. Yates.)

Q. Getting back to my question. Have you any idea how much of these accounts receivable represent items of the charges on these shells?

A. Very little of it.

Q. Can you make an estimate?

A. Yes. I wouldn't say over $500.

Q. That is your best opinion?

A. That really is.

Q. Of the accounts receivable only $500 represent deposits? [24]

A. That is right, and I think I am very conservative.

Q. Did you make any summation of what you considered cash that was paid on these deposits as opposed to credit that was given——

A. No, I didn't.

Q. ——or debit that was entered?

A. No, I didn't, but when I say $500 I am overestimating it.

Q. Was any such estimate made by any one for the Receiver or for the purchasing corporation?

A. No. With the condition of the books you couldn't possibly break that down. You see, you had a funny situation. They started off with three partnerships and they dug up another partnership due to the OPA situation, and they wound up with three corporations. You had several sets of books to deal with. If they were kept properly it would be rather difficult to identify the amount of deposits of each individual customer. We were dealing probably

(Testimony of Ralph J. Yates.)

with a turnover of twelve or fifteen hundred customers.

Q. I understand you are referring to cards that were down in the office of the debtor or bankrupt. It was these cards alone that gave the information?

A. No. These cards give you a clue as to where the bottles were located. They were posted on the cards by the [25] telephone operator. There was no unit or dollar bill control against it.

Q. Was there any entry on the card to show whether it was credit or cash?

A. No, it was supposed to show where the bottles in the territory were located, the number of cases and bottles. In so far as that information is concerned, your smallest item in accounts receivable is the Yankee Doodle Root Beer Bottling Company and the accounts receivable involved there. I don't believe you have all told $2000 worth of collectibles. The offer that Wil-Rud made was $3500, which in their opinion was for the good will. In other words, if Mr. Lynch would call up the customers and bring them in and hound them for money, they may lose a customer. They all have some kind of a grievance. They all have some kind of a claim.

Q. I have no quarrel with that point. I am interested in what entry was made to show the amount of cash and the amount of credit or debit on these bottles.

A. It wasn't identified and you have no detail to support it.

Q. Have you any list of retailers who did busi-

(Testimony of Ralph J. Yates.)

ness with the company which would show who paid cash and who had an entry made?

A. To the best of my knowledge there hasn't been any inquiry made as to who paid cash and who were charged, but the present accounts receivable uses that as a basis. [26] When I say there isn't over $500, as far as I know, outstanding, that is very reasonable.

Q. Referring to these cards and the names entered thereon, has any tape been run as against those cards and the accounts receivable to show how many persons on the accounts receivable are also persons who hold bottles?

A. Yes, sir, there was a tape made.

Q. Do you have that?

A. There was a tape made at that time. The tape was way in excess of $25,000. The figures used had to be disregarded because the condition of the books was such that you couldn't go by the books. You couldn't go by them.

Q. We are referring to these little gray cards.

A. Yes.

Q. I believe you testified you could rely on them to some extent, at least to fifty per cent?

A. To some extent, yes. I would say fifty per cent would bring this alleged estimate substantially correct.

Q. As to those $12,500 entries then, is there any relationship in your mind between those and the accounts receivable as to the parties involved?

(Testimony of Ralph J. Yates.)

A. No, I wouldn't say so. I believe there is a relationship, but I don't want to be bound by it. As a matter of fact, I often wonder whether this fellow Tanner used an Ouija Board when he got up some of these figures.

Q. What I am trying to get at, Mr. Yates, were the [27] names of these tneries in the gray books checked against the accounts receivable?

A. The names?

Q. Yes. A. Oh, yes.

Q. How many of them are there in the gray books and how many were also in the accounts payable?

A. In the gray book Mr. Gendel referred to I think are claims or credits that certain creditors are claiming against CAP and Yankee Doodle Root Beer Bottling Company, and they haven't as yet been entered into the books of the Debtor.

Q. I said gray book, but I really meant these cards wherein there were entered the sixty cent items.

A. On the cards no sixty cents were entered. They had the unit down there. They shipped one hundred cases of root beer to Ralph's place.

Q. Were those names checked against the accounts receivable?

A. The cards were made from the accounts receivable book. All we know is they were the same names, the same accounts, but the card was the statistical card and was supposed to show where the boxes were located.

(Testimony of Ralph J. Yates.)

Q. Are any of the accounts receivable that are being sold persons who are claiming money as deposits under the sixty cent per shell? [28]

A. No, no one.

Mr. Levinson: That is all. May there be enumerated by reference the order approving and confirming the sale signed by the Court and dated October 22, 1947?

The Referee: That is part of my record. It is already enumerated.

Mr. Levinson: In this particular proceeding?

The Referee: We take judicial cognizance of every official file here.

Mr. Levinson: Very well, Your Honor.

Mr. Katz: May I ask a question?

Mr. Levinson: Are you appearing on behalf of a creditor here, counsel?

Mr. Katz: I am appearing on behalf of the Wil-Rud Corporation.

The Referee: He has an interest in the matter.

Mr. Katz: I am interested in the compromise. I don't represent any creditors. I represent the purchaser, unless the purchaser becomes a creditor by reason of these proceedings.

The Referee: Go ahead and ask any question you want. Anybody here can ask any question they want. This is an open forum. We won't have any gag rule here. [29]

(Testimony of Ralph J. Yates.)

Cross-Examination

By Mr. Katz:

Q. Mr. Yates, on page 88-A of the exhibit the total of these bottles on the inventory ran some $47,976.29, is that right? A. That is correct.

Q. None of that item on page 88-A has been delivered to the purchaser, is that correct?

A. I didn't check it out, but I believe that is what the purchaser is contending.

Q. You haven't any record of any delivery of that to the purchaser? A. I have none.

Q. You say that a part of that item of $47,976.29 consists of some 25,807 wood shells holding twenty-four cases each, is that right? A. Yes, sir.

Q. You then ran a tape in an effort to verify whether there were actually 25,807 cases out or more, and your tape indicated that the 25,807 figure was about fifty per cent of what was actually outstanding in cases, is that right?

A. I have no idea what was actually outstanding, but it was fifty per cent of the so-called records they had there, and those records,—I checked them about forty days after this inventory had been taken. [30]

Q. Yes, and when you checked them would you say from your own check the figure of 25,807 wood shells is a conservative estimate in so far as the estate is concerned?

A. Well, I would say I would assume it would be at least fifty per cent correct.

Q. On the basis that they were fifty per cent

(Testimony of Ralph J. Yates.)

correct, the purchaser here under the indicated ruling of the Court would be entitled to 25,807 shells holding twenty-four bottles each?

A. I don't know what you are entitled to. I would say that would be a substantially correct quantity.

Q. The quantity would be substantially correct?

A. Yes.

Q. Now, you say you were familiar with the practice concerning deposits on these shells. Will you tell us what that practice was?

A. After Mr. Lynch went in there I went out and installed a system and I followed along the same practice that they had been using prior to the petition in bankruptcy. When they would deliver one hundred cases of root beer to a customer they would charge the customer sixty cents for the cases and eighty cents for the product. Then if they were to get back fifty cases or take back 120 cases they would give credit. Then that difference between the charge and the credit, the driver would pick up the cash.

Q. For every shell, including twenty-four bottles delivered to the customer, the customer was charged and paid sixty cents, is that correct?

A. That is correct.

Q. When the customer turned back the case to the Debtor, the customer became entitled to the return at the rate of sixty cents per case for each case he returned to the Debtor, is that correct?

A. That is correct. The driver was instructed

(Testimony of Ralph J. Yates.)

to try to pick up as many cases as he could because they were short on cases and glasses.

Q. During the time the Receiver was operating the driver was instructed to give each customer who surrendered a case credit of sixty cents per case?

A. That is correct.

Q. That was paid immediately?

A. That is correct.

Q. You could not pick up a case from a customer unless the driver gave him the sixty cents?

A. That is correct.

Q. That was the practice which this Receiver continued, following the practice of the Debtor, is that correct? A. That is correct.

Q. That practice was followed under the direction of Mr. Lynch and yourself in the operation of the business? [32]

A. Under the direction of Mr. Lynch. I was out there helping him.

Q. Were the officers of the Debtor corporation around there and were they familiar with that practice at the time? A. Yes.

Q. These cases are not sold to the customer who buys the root beer? A. That is correct.

Q. They are deposited with him?

A. That is correct.

Q. Actually the cases and the bottles are worth more than sixty cents? A. About $1.80.

Q. So that from the standpoint of the Debtor or the purchaser, he would be better off getting the cases than getting the sixty cents?

(Testimony of Ralph J. Yates.)

A. Unquestionably so.

Q. Let me see if I understand you, Mr. Yates. You would state to this Court, based upon your actual operation of the business and the practice which you, through Mr. Lynch, carried on, that each customer having one of these cases is entitled to get sixty cents before the Debtor can pick up that case from the customer?

A. That is correct. That is my understanding as to what the Wil-Rud Corporation is to do. They are to assume [33] that liability.

Q. And it is the practice which you followed while you were running this business?

A. While Mr. Lynch was running the business.

Q. And according to your best knowledge it is the practice the Debtor followed while it had the business? A. That is correct.

Mr. Katz: That is all.

Recross-Examination

By Mr. Lutz:

Q. Did the Receiver, to your knowledge, ever pay sixty cents to any one for these cases?

A. Yes.

Q. In cash?

A. Yes—practically on every sale he made there was a return and he paid sixty cents.

Q. That was a credit?

A. That is the same thing.

Q. He exchanged the cases? A. Yes.

Q. But you never had a bunch of cases delivered

(Testimony of Ralph J. Yates.)

to you without an order and paid sixty cents per case, did you? A. No.

Q. Was that all you were doing, like exchanging milk bottles? [34] A. That is right.

Q. The customer would put a bottle out and you would put another bottle in?

A. That is right. Of course, there would be a shrinkage. People would take the bottles home. I believe I was told by the bottling manager that it was a twelve time round trip through breakage and shrinkage.

Q. In other words, twelve times a round trip?

A. You lose your case.

Q. You would lose your case and bottles?

A. Yes.

Q. And there would be no claim against you?

A. That is right.

Q. The way the books were kept there was no method of reconciling that loss?

A. If proper books were maintained you could tie that in. You see, the books were kept on work sheets by the accountant. He would have his man come in every so often. Then they would prepare a balance sheet, an operating statement. It was a deal where they had clerks in the office and the books were maintained in the accountant's office on work sheets.

Q. Do you have any opinion as to what percentage of the shells in the inventory had disappeared by reason of the twelve times out rule?

(Testimony of Ralph J. Yates.)

A. I haven't any idea, but you could ascertain that. [35] It would be strictly a guess. You would take the purchases and tie them in with the remaining bottles and compare that with the sales.

Q. Do you know when the last purchase of bottles or shells was made at the company to replace its stock?

A. I think there was a substantial purchase made about thirty days before the petition was filed.

Mr. Lutz: That is all.

Recross-Examination

By Mr. Katz:

Q. My attention has been called by Mr. Wilder to the following legend on each case. I want to see if it checks with your recollection.

Do you not recall that each case contains this legend: "Deposit sixty cents," right on the face of the case?

A. As I stated to the gentleman here, I know sixty cents was marked, but as to the legend I don't know.

Q. Does sixty cents appear on each case?

A. Yes, I remember sixty cents, but I don't remember whether it is marked deposit or not.

Mr. Levinson: Will Your Honor grant a continuance to permit bringing in a sample case?

The Referee: I will give you a thirty-minute intermission. [36]

Mr. Levinson: Can you do it in thirty minutes?

Mr. Katz: Mr. Lynch is here. Wouldn't you accept his word?

(Testimony of Ralph J. Yates.)

Mr. Levinson: No, I wouldn't. The exact wording is important here.

The Referee: I will give you thirty minutes. I am not going to string this thing along.

Mr. Levinson: Will your Honor pass it? If your Honor is willing to do that, we can get a case in here and see exactly what it says.

The Referee: I think it is immaterial. You have heard the testimony that that was the practice. Everybody charges for cases and bottles. Whether it said deposit or advance or whatnot, I don't think makes a particle of difference. Any other questions of this witness?

Cross-Examination

By Mr. Gillin:

Q. On the accounts receivable item proposed to be sold for $3500, is there any list of those accounts receivable in court, Mr. Yates?

A. Not in court. The Wil-Rud Corporation have that list. Unfortunately they failed to bring it in this morning. But your client, incidentally, is listed on that list.

Q. I appreciate that and that I know. What I wanted to find out is the exact amounts shown and these offsets. [37] I wanted to know if there was any such list here so that one might intelligently examine it.

A. There is a list and the Wil-Rud Corporation has that list.

(Testimony of Ralph J. Yates.)

Q. But there is none in the hands of the Receiver? A. Not at this time, no.

Q. Let me ask you something else then. I note that you stated the value of the accounts receivable of the Yankee Doodle Root Beer Company, which would be the company in effect which my clients would be shown as indebted to since their dealings were in root beer rather than the general corporate picture, were worth some $2000. In making that statement, were you taking into account the fact, as it now turns out to be, that the Wil-Rud Corporation, assuming that they had these accounts receivable and having proceeded on the assumption that they would buy them, is expecting to receive the sum of approximately $3000 from one of these accounts alone, to wit, my client the Yankee Doodle Root Beer Bottling Company of San Fernando Valley, Inc.?

A. No, sir. As I understand it, the Wil-Rud Corporation is buying whatever right, title and interest the Receiver had in accounts receivable as of the 22nd, I believe, of last month. It was pointed out at the time that there would probably be an offsetting claim of approximately $10,000 against any claim. [38]

Q. Let me ask you this question, Mr. Yates. That claim, as it turns out now, and which has been since made of record, is $32,500 and not $10,000, representing the actual loss suffered. That is apart from cash loss suffered by the sale to my client of an asset which the Bankrupt did not own

(Testimony of Ralph J. Yates.)

but collected for. So that the actual loss suffered by my clients, through the machinations of this corporation, amounts to some $32,500, and has now been fixed in that amount——

The Referee: Don't say that. It hasn't been fixed.

Mr. Gillin: Not by the Court.

The Referee: Don't make that statement. That is incorrect. You filed a claim.

Mr. Gillin: Fixed in accordance with my client's accounting, not in accordance with this Court.

The Referee: Say fixed in your client's mind.

Mr. Gillin: All right, your Honor.

Q. Now, Mr. Yates, proceeding on the assumption—whether it be $10,000 or $32,500—if these claims are sold, these accounts, you say they would be subject to the setoffs. Now, what I want to find out is, what happens to the setoffs over and above the amount of the claim?

A. I am not qualified to answer that question. That is a legal question. All I know, all Wil-Rud is buying in so far as your client is concerned is any equity he may have in your account, and Wil-Rud is not assuming any [39] deficiency or liability that may result as a result of the offset.

Q. That answers the question. To go one step further, if this accounting, among others which may be similarly situated, is still off, it is a fact, isn't it, that the Receiver or Trustee, if this thing be-

(Testimony of Ralph J. Yates.)

comes a regular bankruptcy, would then be left with a very substantial claim against it and would no longer be left with an item which could be used for a settlement or petition to compromise.

The Referee: I think you are getting into a legal question which this man is not qualified to answer. He is an accountant and not a lawyer.

Q. (By Mr. Gillin): Asking you directly from an accountant's standpoint, Mr. Yates, then there would still be left as a claim against the bankrupt estate a difference between that amount of setoff necessary to exactly equal the claim being sold and the amount of the setoff as it might ultimately be determined by the Court?

A. It is a matter of computation. Usually I believe those setoffs would become unsecured claims.

Q. That is right, against the estate?

A. That is correct, together with the others.

Mr. Gillin: That is all.

The Referee: Let's take a five-minute recess.

(A short recess at this point.) [40]

The Referee: Are you ready to resume?

Mr. Gendel: Is there anything further wanted of Mr. Yates by these various gentlemen? * * * Mr. Wilder, will you take the stand, please?

WOLF WILDER

called as a witness on behalf of the Receiver, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Gendel:

Q. What is your true name, please?

A. Wolf Wilder.

Q. Your residence? A. Los Angeles.

Q. Are you connected with the Wil-Rud Corporation? A. I am the secretary.

Q. You are the "Wil" of Wil-Rud, are you?

A. That is correct.

Q. Have you been in active contact with the assets of the Debtor corporation taken over after October 15, 1947, by the Wil-Rud Corporation?

A. I have.

Q. Have you had any personal contact with this wooden shell problem? A. I have. [41]

Q. Have you examined any of the old invoices that were sent out by the California Associated Products or the Yankee Doodle subsidiaries prior to July 28?

A. I have. We are still using the same ones.

Q. You are using the same forms?

A. Yes.

Q. Can you tell us as closely as you recall verbatim the customary phraseology with reference to the so-called sixty cent problem?

Mr. Levinson: I object to that as not the best

(Testimony of Wolf Wilder.)

evidence. This is a very vital question, Your Honor. We should have the exact wordage.

The Referee: I don't think it makes any difference.

Mr. Levinson: I do, Your Honor, because if they have a lien then my attitude would be one thing. If the people put up sixty cents, that is one thing, but if not, that is another story.

The Referee: How could they have a lien?

Mr. Levinson: If Your Honor agrees that they have no lien that is enough as far as I am concerned.

The Referee: It is a deposit. It is a claim they would have.

Mr. Levinson: The Receiver on the other hand in his petition—may I have it, please? I loaned it to you, Mr. Gendel—he made a so-called statement that they have something in the nature of a lien or some kind of a claim, [42] and he set forth in his petition these words—my attitude might change entirely on this if I felt that these people who had sixty cents had a lien, and I think Mr. Steinmeyer is in the same position. Is that right, Mr. Steinmeyer? We represent about *$200,00* in creditors.

Mr. Katz: May I say this?

Mr. Levinson: Excuse me. Here is what the Receiver says in his petition regarding the compromise.

The Referee: All right.

Mr. Levinson: (Reading) ". . . that the Debtor

(Testimony of Wolf Wilder.)

has taken deposits of sixty cents per case, and that said deposits are reflected by the fact that each of the customers having possession of the cases and bottles therein have a lien by virtue of the possession thereof until the sixty cents is repaid; . . ." Now that is an indication that the Receiver may think they have a lien. If Your Honor does not think they have a lien that is quite another story.

Mr. Katz: Let's see what actually happened. Under this order here we are to get a certain number of cases. We would be much better off as far as we are concerned if the Receiver went out and got the cases and delivered them to us. We would get $1.80 a case. But he can't deliver the cases to us. What does it cost to go to each of the customers and say, "Surrender the case to me"? In the first place they will not do it because the truth of the matter is there is a possessory right. I don't know whether you [43] would call it a pledge or what it is, but a person who has paid sixty cents as a deposit on these cases and who has possession of them would have what is pretty much like a situation in a bank. They have a banker's lien.

The Referee: I don't recall any section of the Lien Code that gives a man a lien on a box because he pays sixty cents on it. Can you cite me something?

Mr. Katz: Except that he has this right of possession to hold it until his right thereon is paid off. He has paid sixty cents for those cases.

(Testimony of Wolf Wilder.)

The Referee: As I understand it, liens are the creatures of statute.

Mr. Levinson: Correct, Your Honor.

Mr. Katz: And there is a lien dependent on possession.

The Referee: That is true if you have a blacksmith's shop or an automobile shop, but the statute specifically enumerates it.

Mr. Katz: But there is a common law right dependent on possession. There are a multitude of rights.

The Referee: There may be an offset right.

Mr. Katz: You couldn't compel this person, it seems to me, and if the estate can compel him, fine, let them go out and get the cases. We are not anxious to get the compromise, candidly, because the cases do us more good than the amount we are settling for. But looking at it from the practical standpoint of creditors for less than [44] sixty cents even pick up the boxes and deliver them to the buyer.

The Referee: I don't think you could.

Mr. Levinson: Your Honor, that makes vital the question of whether they have a lien by express written agreement. If that is true, that is one proposition. Otherwise, I feel as Your Honor does, they are nothing but common creditors to the extent of sixty cents.

Mr. Katz: How does that solve our problem? Just give us our cases.

(Testimony of Wolf Wilder.)

Mr. Levinson: There is some question as to what your proposition is.

The Referee: Do you object to this gentleman telling us what is on the boxes?

Mr. Levinson: I would like to have the exact written words.

The Referee: Objection overruled. He can tell us what he read a lot quicker than bringing a crate in here. What is the question?

Q. (By Mr. Gendel): I asked you to give us if you can verbatim the exact phraseology on the invoices, and then we will get to the shells.

A. The delivery slip or invoice gives the name of the firm, the Yankee Doodle Root Beer Company, and then the customer's name, and the word "fulls, medium or small," and then "empty, large, medium, small," and then spaces to [45] fill in the amount. "Charge customer for amount of fulls less the amount of empties returned," and the net amount to be paid in cash is to be charged.

Q. Have you seen any invoices, Mr. Wilder, which represented an original delivery of what you describe as fulls to a customer, a retail customer?

Mr. Katz: We are not talking about the trucker's slip that you described; we are talking about the invoice.

The Witness: The actual invoice? I can't say just what the wording is on the actual invoice sent out by the office.

Q. (By Mr. Gendel): What if anything can

(Testimony of Wolf Wilder.)

you tell us about the stamp on each of these shells?

A. There is a round circle with the deposit halfway around it and sixty cents burned in on the ends of each one of these shells. There is the word "deposit" and then 60 and the cent mark and a circle. That is the exact wording.

Q. That is branded into each of the shells?

A. That is correct.

Q. How long would it take to have somebody bring in one of the invoices or a sample?

A. We could have them here within thirty minutes.

The Referee: I am going to a Bar luncheon at noon. If you want to put this over until afternoon, all right.

Mr. Levinson: I cannot come this afternoon.

The Referee: I am sorry, but we are going right ahead. I will not defer these hearings any longer.

Mr. Levinson: You may dispose of it now, as far as I am concerned, Your Honor.

Mr. Katz: We are ready.

Q. (By Mr. Gendel): Mr. Wilder, have you yourself made any effort to ascertain how many shells were outstanding as of the time that you took over with the various customers that you inherited?

A. No, sir. I couldn't make any attempt to verify what shells were in the customers' possession.

Q. You have been operating the plant several months now? A. Three months.

Q. Three months, and you have nothing that

(Testimony of Wolf Wilder.)

you could give us in the way of factual information on how many shells have been found to be in the hands of customers? A. No, sir.

Q. Do you know whether or not there were approximately 25,000 shells outstanding in the hands of retail customers on October 15, 1947?

A. I would have no way of knowing.

Q. Have you attempted to reconcile the records of the Debtor corporation referred to by Mr. Yates?

A. We don't have them. We don't have the records. They are in the possession of the Receiver.

Q. You have not checked those records yourself?

A. Oh, no.

Mr. Katz: Mr. Rudolph handled that on the inventory.

Mr. Gendel: That is all.

Mr. Gillin: I would like to ask a question concerning the accounts receivable, Your Honor.

Cross-Examination

By Mr. Gillin:

Q. Is it not a fact approximately a week or ten days ago, undoubtedly subsequent to the time that you had some sort of a preliminary arrangement with Mr. Gendel as to the accounts receivable of which we have no list, but prior to this date, you instructed Mr. Katz to collect the sum of approximately $3000 on——

Mr. Katz: We will object to that.

Mr. Gillen: Let me finish the question, please.

(Testimony of Wolf Wilder.)

The Referee: Go right ahead with your question.

Mr. Gillin: (Continuing) ——to collect the sum of $3000 on one of these accounts receivable, to wit, that against the Yankee Doodle Root Beer Bottling Company of San Fernando Valley, Inc.

Mr. Katz: We object to the question on the ground it is immaterial.

The Referee: I will let him answer the question. Do you know that, sir? [48]

The Witness: I told Mr. Katz that the Yankee Doodle of Glendale was in escrow and that there was money coming under the list of accounts receivable and to take such action as he saw fit.

Mr. Katz: And Mr. Katz told you that no claim could be presented until you became the purchaser, didn't he?

The Witness: That is correct.

Q. (By Mr. Gillin): Is it not a fact that when you were specifically questioned by Mr. William Lansburg, one of the former stockholders of Yankee Doodle Root Beer Bottling Company of San Fernando Valley, Inc., shortly after the incident I speak of, that you told him that Mr. Katz acted at your specific instruction?

A. Well, Mr. Katz told me we could file a claim.

Q. No. I am asking you if it is not a fact that you so informed Mr. Lansburg that Mr. Katz was acting under your specific direction?

A. I told him to take the matter up with Mr. Katz because I had nothing to do with it.

(Testimony of Wolf Wilder.)

Q. You did not tell him that you had requested Mr. Katz to proceed as he had with respect to this escrow?

A. I told him to refer the matter to Mr. Katz. I told him I didn't care to discuss the matter with him. I told him to contact Mr. Katz.

Mr. Gillin: All right. We will ask Mr. Katz further about that. [49]

The Referee: I am not concerned with that for the reason you say you have a claim of $32,000 against somebody, a $10,000 claim or at least a $4500 claim for something that was sold to you. I am not going to let you ramble all over the lot and explore possible losses.

Mr. Katz: You don't contend you paid, do you?

Mr. Gillin: We do not.

Mr. Katz: All right, then.

Mr. Gillin: But I think I should have an opportunity for objecting to the sale of the accounts receivable.

The Referee: Let's hear it.

Mr. Gillin: The objection is on file, but I would like to summarize it. The situation very briefly is this. This bottler whom I represent, one of those franchised by the company, sustained a very serious financial loss because of the actions or lack thereof, of the company, the California Associated Products Company, a wholly owned subsidiary of the Yankee Doodle Root Beer Bottling Company. The losses which my client sustained as a result—I don't like

(Testimony of Wolf Wilder.)

to use the word defalcation, although it is certainly true under some circumstances, but certainly a failure to properly carry out their own commitments as to operations of their own business caused my clients some $32,000, and there is a claim in that amount on file in this proceeding. Now, if these accounts receivable were sold for a total of $3500, being some $50,000 worth, and this account of $3000 is sold with it, this situation will have resulted—whereas at the present moment there is in the hands of the Receiver and his attorney an offer by my client to pay to the Bankrupt the sum of $250 and wipe out its claim for $32,500, assuming that the Bankrupt wipes out this claim for $3000, the end result of that offer will be that the estate will receive $250 and will be absolved of a claim for $32,500 on which a very substantial dividend would be paid, assuming all or any part of it is allowed by this court; but if these accounts receivable are now sold as proposed for $3500, this estate will have to stand the expense of litigating or defending against the $32,500 claim, and the result will be finally that considerable expense will be incurred that way, and in addition thereto, my clients may wind up with a substantial claim against the estate. I feel that the proper form in which to thrash out any differences and attempt to come to some settlement is here and not elsewhere.

Mr. Gendel: If Your Honor please, I would like to make this statement for the record. It is

(Testimony of Wolf Wilder.)

true that probably some time in October one claim was filed by the Yankee Doodle Root Beer Bottling Company of San Fernando Valley, Inc., the client of Mr. Gillin. That particular claim had not been called to our attention, nor was the administration of the estate in a status where we were considering objections to claims. After the proposed sale of accounts receivable was entered into, then Mr. Gillin became rather active in pressing the various claims and supplementing them. I have discussed the matter briefly with Mr. Lynch and I would suggest this: In view of the size of the claim of their client alone and considering the fact that there may be other persons in the same position, and the fact that we might be able to collect, say, $2000 instead of the proposed $3500 that is offered here, I think it might be advisable to withdraw the offer of sale of the accounts receivable from the consideration of the compromise. That would then leave to the Court and the purchaser the problem as to whether we should approve the compromise as submitted to the Court separate from the petition for the return of sale. In that way we might eliminate and prevent any hardship to any alleged debtors of the estate who might to some substantial extent end up being creditors, thereby saving for future unsecured creditors a bigger share of the dividend which might be payable, because even if one claim were allowed of approximately $10,000 and we were to pay a thirty-five cent dividend ultimately, which we ap-

(Testimony of Wolf Wilder.)

proximate we may be able to pay, that one claim would be equivalent to the purchase price being offered. If we could work that out, the Receiver is still in a position with reference to the cases where it is the better part of discretion, in view of the Court's indicated ruling on the first matter so far submitted, and [52] that is on the shortages, that the compromise should be completed. We don't like it, but those are the circumstances. We have stated our position and it is now up to the Court and the other creditors. We do feel it might be advisable to all concerned, however, to withdraw the accounts receivable from the sale.

Mr. Lutz: Before leaving the question of the cases may I ask a few questions of the witness?

The Referee: Go ahead.

Cross-Examination

By Mr. Lutz:

Q. Mr. Wilder, has the Wil-Rud Corporation, for instance, when this sale was consummated, did it take possession of the plant of the California Associated Products on or about the sale date, October 15?

A. We took possession October 15.

Q. You went into the plant and started operation, is that correct? A. That is right.

Q. Have you been manufacturing and selling root beer and other similar products that the company was engaged in previously?

(Testimony of Wolf Wilder.)

A. Not myself personally, no.

Q. Well, the company. Has the corporation or the buyer been engaged in that? [53]

A. No.

Q. Has the plant been operated at all?

A. Now, wait a minute. Which company are you talking about?

Q. The Wil-Rud Corporation, the buyer.

A. The Wil-Rud Corporation was not in the bottling business before they took over this plant.

Q. Well, have they been in the bottling business since they took over the plant?

A. We are operating the plant.

Q. You are operating the plant. Have you been manufacturing and selling root beer since you took over the plant? A. Yes, sir.

Q. Has that root beer been cased in shells and sent to distributors? A. Yes, sir.

Q. How cany cases have you manufactured since you took over in October?

A. Oh, I can't give you that figure.

Q. Approximately?

The Referee: How would that be material?

Mr. Katz: Yes, what difference would it make. He lost about $10,000 a month.

Mr. Lutz: I think the question is material because if they manufactured root beer and sold it they had cases. [54]

The Referee: Undoubtedly they had cases.

(Testimony of Wolf Wilder.)

The Witness: There were quite a few thousand cases on hand in the inventory elsewhere.

Q. (By Mr. Lutz): What have you done in selling your root beer? Have you delivered it in cases and picked up other cases?

A. That is right.

Q. How many cases have you sold since the Wil-Rud Corporation took over the plant?

A. It would be pretty hard to say offhand.

Q. What is your best estimate?

A. Oh, about five hundred a week.

Q. That is over a period of a little over three months, is that right? A. About three months.

Mr. Lutz: That is all.

The Referee: Any other questions?

Mr. Gillin: Yes, Your Honor. I would like to supplement what Mr. ——

The Referee: Your matter is pretty well settled if these accounts are withdrawn, counsel.

Mr. Gillin: If you have withdrawn them I have nothing further to say.

The Referee: Then why gild the lily? You don't have to paint it; it is already white.

Mr. Gillin: Very well, Your Honor. [55]

Mr. Katz: That is all.

The Referee: Has anybody else anything to say? All right, I will approve this.

Mr. Levinson: May we have an expression from counsel representing the creditors as to whether or

not they are in favor or against the compromise, just as a matter of record?

The Referee: Yes, sir. I would be glad to hear anybody's opinion on it.

Mr. Levinson: I vote on behalf of my own claim and W. M. Yaffee & Co. against approval of the compromise.

Mr. Steinmeyer: As far as the Bank of America is concerned, if the Court please, we object to the compromise because I think from the evidence introduced here and the testimony taken, there is no showing that the purchaser at this sale is entitled to any protection on account of the purchase price by reason of any of the matters that are set forth in the petition or which have been introduced in evidence. The sale was made of the property as is and where it is wherever situated. The Debtor took possession of the stuff. He has apparently been able to get possession of a large number of cases in the hands of distributors. There is no showing that there is any lien or encumbrance, to indicate that there was not a compliance with the sale free and clear of lien. The contract of the purchaser was to buy the property wherever situated and that is what [56] is what they did. I see no basis for any reduction in the purchase price from a solvent purchaser on a sale that was confirmed after extensive competitive bidding by reason of any of the facts that have been brought out here. I wish to call the Court's attention to the fact that at the time of the

sale in this room there was considerable discussion as to what the assets were so the purchaser, not only this purchaser, but also the other bidders had had an opportunity to examine the plant and the inventory. They were already aware that the property was being sold in its then condition. I think there is no basis for any argument that they did not know what they were buying or did not get what they thought they were buying.

Mr. Lutz: On behalf of Victor Kramer I would object to it.

Mr. Cotter: On behalf of the F. W. Boltz Corporation, we object to the compromise because the compromise depends on the question as to whether or not these deposits were a lien upon the cases which were sold and whether or not possession could be given to the buyer because of it. If the compromise were based on the as is question alone, that would not be involved in our present objection. We object very strenuously to it on the ground there is no lien and on the basis of the testimony taken this morning that that is one of the primary reasons for sustaining the compromise if the compromise were to be sustained. [57]

Mr. Gillin: On behalf of the Yankee Doodle Root Beer Bottling Company of San Fernando Valley, Inc., we object only to that portion of the proposal relating to the accounts receivable.

The Referee: That is practically out of the window now.

Mr. Gillin: I did not hear Mr. Katz say he agreed to withdraw it.

The Referee: I think this compromise is fair. I don't think any man ought to be required to pay for anything he doesn't get. He had a right to rely upon the inventory prepared. So I will approve this compromise.

As to the accounts receivable, they will be withdrawn from the sale and the Receiver will try to do what he can to collect on them.

These books were kept by a man named Tanner in a way that nobody could tell what the situation was.

Mr. Katz: I wonder, in the light of what appears to be an exception, if I could get one question in from Mr. Rudolph so that the record is clear.

Mr. Levinson: If it is necessary to note an exception I will do so.

The Referee: You don't need to.

Mr. Levinson: On behalf of my client and myself, but I don't think it is necessary.

The Referee: You have ten days in which to review.

Mr. Levinson: May a copy of the proposed order be [58] served upon me?

Mr. Steinmeyer: I would like to see a copy of it before it is signed.

The Referee: All right.

Mr. Katz: I had assumed this was stipulated to in my discussion earlier with Mr. Gendel.

(Mr. Rudolph approaches the witness stand.)

Mr. Levinson: I understood the matter was closed. His Honor made a ruling favorable to you, Mr. Katz.

A Voice: Has Mr. Rudolph been sworn?

Mr. Katz: I wanted to have the record clear on one matter which Mr. Gendel stipulated to, but I think the record should be cleared up.

The Referee: If you intend to review me I want to be as safe as I can, gentlemen.

(Mr. Rudolph sworn.)

Mr. Katz: Mr. Gendel, I have here what is a copy of the inventory, which the earlier hearing in this matter shows was delivered by a representative of Mr. Lynch to Mr. Rudolph before the bid was made. Will you stipulate this is a copy of the inventory delivered to Mr. Rudolph before he made the bid upon the assets by a representative of the Receiver?

Mr. Gendel: Mr. Katz, I will stipulate that the Receiver had an inventory out at the premises and that Mr. [59] Rudolph looked at the inventory, and that page 88-A contains what is written thereon.

Mr. Katz: All right.

Mr. Levinson: I object, Your Honor, to any testimony being taken by this party here because he is not a party to the proceedings. This is a proceeding for the Court and the creditors to pass on.

The Referee: But this man is a purchaser.

Mr. Levinson: It doesn't make any difference, Your Honor.

The Referee: I think it does.

Mr. Levinson: That is all I have to say as far as this matter is concerned.

The Referee: All right, sir. Proceed, Mr. Katz.

SAM RUDOLPH

called as a witness, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Katz:

Q. Mr. Rudolph, is this a counterpart of the instrument you were shown by the Receiver prior to the time you made the bid? A. Yes, sir.

Q. Did you examine page 88-A?

A. I did, sir. [60]

Q. That shows items totaling some $47,976.29, consisting of bottles and cases, is that right?

A. That is right, sir.

Q. Has the Receiver ever made delivery to you of any of the items listed on page 88-A?

A. He has not, sir.

Mr. Katz: May I offer page 88-A, if the Court please?

Mr. Gendel: For the purpose of the record, couldn't we read page 88-A in? It might be clearer if it is included in the transcript.

Mr. Katz: We will stipulate the reporter may make a copy of page 88-A of the inventory and give it a deferred exhibit number.

Mr. Gendel: So stipulated.

Mr. Katz: Is that agreeable to the Court?

The Referee: Yes, sir.

Mr. Katz: That is all.

Mr. Gendel: No questions.

The Referee: Very well, that is all, gentlemen.

(Which was all the evidence offered and received at the time and place aforesaid. The page referred to, 88-A, was copied and is appended hereto and marked Exhibit 1.) [61]

EXHIBIT 1

Copy of Page 88-A of Inventory
Bottles and Cases

Alleged to be in the vicinity or territory of Los Angeles, California.

74,640 root beer bottles 7 oz. 518.13 Gross 5.80	$ 3,006.33
634,708 root beer bottles 10 oz. Gross 6.11	26,930.87
25,807 wood shells (hold 24 each) each .699	18,039.09

Above figures received from Mr. Leo Brill on August 13, 1947. [62]

State of California,
County of Los Angeles—ss.

I, Byron Oyler, Official Court Reporter, hereby certify that the foregoing sixty-two (62) pages compromise a true and correct transcript of my

shorthand notes of the testimony given in the above entitled matter.

Dated this fifth day of February, 1948.

/s/ BYRON OYLER,
Official Court Reporter.

[Endorsed]: Filed April 13, 1948.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 71, inclusive, contain the original Petition Under Chapter XI of the Bankruptcy Act; Approval of Debtor's Petition and Order of Reference Under Section 322 of the Bankruptcy Act; Referee's Certificate on Review; Order Confirming and Approving Sale; Petition for Order to Show Cause re: Wil-Rud Corporation Sale; Order to Show Cause re Wil-Rud Corporation Sale; Petition for Leave to Compromise re Wil-Rud Corporation Sale; Notice of Hearing on Petition to Compromise and Sale of Accounts Receivable; Findings of Fact, Conclusions of Law and Order of Referee Approving Petition for Leave to Compromise Wil-Rud Corporation Sale; Petition for Review of Referee's Order Dated February 26, 1948 by Judge; Memorandum Opinion; Notice of Appeal filed January 14, 1949; Bond for Costs on Appeal filed January 14,

1949; Designation of Record on Appeal filed February 2, 1949; Findings of Fact, Conclusions of Law and Order Granting Petition for Review and Reversing Order of Referee Approving Compromise; Notice of Appeal filed June 21, 1949; Bond for Costs on Appeal filed June 21, 1948; and Designation of Record on Appeal filed June 30, 1949 and full, true and correct copy of Minute Order Entered December 16, 1948 which, together with copy of reporter's transcript of proceedings on October 15, 1947, November 7, 1947 and January 29, 1948, and original petitioner's exhibits Nos. 1 and 2 at the hearing held November 7, 1947, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 28 day of July, A.D. 1949.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12309. United States Court of Appeals for the Ninth Circuit. Wil-Rud Corporation, Appellant, vs. E. A. Lynch, Receiver and Trustee of the Estate of California Associated Products Co., Aaron Levinson, Victor Kramer, Bank of America National Trust and Savings Association, F. W. Boltz Corp., and Leo Brill, Appellees. Transcript of Record. In Two Volumes. Vol. I. Appeals from the United States District Court for the Southern District Court for the Southern District of California, Central Division.

Filed July 29, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 12309

In the Matter of

CALIFORNIA ASSOCIATED PRODUCTS CO., a corporation, doing business as YANKEE DOODLE ROOT BEER BOTTLING COMPANY,

Bankrupt.

WIL-RUD CORPORATION,

Appellant,

vs.

E. A. LYNCH, et al.,

Appellees.

STATEMENT OF APPELLANT'S POINTS INTENDED TO BE RELIED UPON ON APPEAL

To the Clerk of the Above Entitled Court, and to the Appellees and Petitioners for Review, Bank of America National Trust and Savings Association, Leo Brill, F. W. Boltz Corporation, a California Corporation, Victor Kramer, and Aaron Levinson, and to their respective counsel of record, and to E. A. Lynch, Receiver and Trustee in the Above Entitled Action, and to His Counsel of Record:

Pursuant to Rule 19, subdivision 6, of the Rules of this Court, Wil-Rud Corporation, a corporation, appellant herein, hereby states the points upon

which it intends to rely upon its appeal herein, taken from that certain Order of the District Court of the United States, Southern District of California, Central Division, granting the Petition for Review, and reversing the Order of Referee Approving Compromise, heretofore made, and entered on May 26, 1949, in Judgment Book 58, page 475, in the office of the Clerk of said District Court, reversing the Order of the Referee, dated February 26, 1948, upon the Petition for Review of Aaron Levinson, Bank of America, Leo Brill, F. W. Boltz Corporation, and Victor Kramer (hereinafter referred to as "Order"), as follows:

1. That the aforementioned Order is contrary to law.

2. That the aforementioned Order is contrary to the evidence in this case.

3. That the aforementioned Order is unsupported by the evidence in this case.

4. That the evidence is insufficient to justify and support said Order.

5. That the Findings of Facts made by the said District Court are contrary to the evidence in this case.

6. That the Findings of Facts are unsupported by the evidence in this case.

7. That the Conclusions of Law of the said District Court are contrary to law.

8. That the Conclusions of Law of said District Court are contrary to the evidence in this case.

9. That the Conclusions of Law of said District Court are unsupported by the evidence in this case.

10. That the said District Court exceeded its authority and jurisdiction upon review in making findings of fact upon issues and matters not before it upon the Petition for Review.

11. That the District Court erred in reversing the Order of the Referee Approving the Compromise between the Receiver and Appellant.

12. That the District Court erred in making its Findings of Facts, among other things, in the following particulars:

a. That Finding of Fact No. 2, in so far as it purports to find "That said inventory does not purport to be other than an inventory made as of July 28, 1947. That this fact was made known to all bidders. That at the time of the sale the said assets were offered 'as is' and without any warranty as to quantity or quality and without any reference to any inventory. That immediately after the confirmation of the sale, the assets so sold were delivered to the Wil-Rud Corporation." is contrary to the evidence in this case.

b. That the portion of Finding No. 2, set forth in subdivision "a" hereof, is unsupported by the evidence in this case.

c. That the aforementioned portion of Finding

No. 2, set forth in subdivision "a" hereof, is outside of any issues presented upon the Petition for a Leave to Compromise Controversy, and was not before the Referee upon said Petition, and therefore is in excess of the District Court's jurisdiction to make findings thereon upon review.

d. That Finding No. 4 is contrary to the evidence in this case.

e. That Finding No. 4 is unsupported by the evidence in this case.

f. That said Finding No. 4 is beyond the issues presented on the Petition to Compromise Controversy before the Referee, and therefore is in excess of the jurisdiction of the District Court on review.

g. That Finding No. 5 is contrary to the evidence in this case.

h. That Finding No. 5 is unsupported by the evidence in this case.

i. That said Finding No. 5 is beyond the issues presented on the Petition to Compromise Controversy before the Referee, and therefore is in excess of the jurisdiction of the District Court on review.

13. That the District Court erred in making its Conclusions of Law as follows:

a. That Conclusion of Law No. 2 is contrary to law.

b. That Conclusion of Law No. 2 is contrary to the evidence in this case.

c. That Conclusion of Law No. 2 is unsupported by the evidence in this case.

d. That Conclusion of Law No. 3 is contrary to law.

e. That Conclusion of Law No. 3 is contrary to the evidence in this case.

f. That Conclusion of Law No. 3 is unsupported by the evidence in this case.

g. That Conclusion of Law No. 4 is contrary to law.

h. That Conclusion of Law No. 4 is contrary to the evidence in this case.

i. That Conclusion of Law No. 4 is unsupported by the evidence in this case.

j. That Conclusion of Law No. 5 is contrary to law.

k. That Conclusion of Law No. 5 is contrary to the evidence in this case.

l. That Conclusion of Law No. 5 is unsupported by the evidence in this case.

14. That the aforementioned Conclusions of Law Nos. 3, 4 and 5 are, and each of them is, in excess of the jurisdiction of the District Court on review, in that they purport to determine issues not presented to, or before the Referee on the Petition to Compromise Controversy.

Dated this 12 day of September, 1949.

CHARLES J. KATZ.

By /s/ SAMPEL W. BLUM,
Attorneys for Appellant.

[Endorsed]: Filed Sept. 19, 1949.

[Title of Court of Appeals and Cause.]

STIPULATION IN LIEU OF PRINTING PORTIONS OF RECORD

It Is Hereby Stipulated and Agreed, by and between the appellant, Wil-Rud Corporation, and the appellees, Bank of America, Leo Brill, F. W. Boltz Corporation, Victor Kramer, Aaron Levinson, and E. A. Lynch, by and through their respective counsel, that the following shall become a part of the record herein and considered upon this appeal; that the same shall become a part of the printed record herein in lieu of that portion of the record herein to which the same relates as follows:

1. That on July 29, 1947, a Petition for Plan of Arrangement under Chapter XI of the Bankruptcy Act was filed by California Associated Products Co., a corporation, doing business as Yankee Doodle Root Beer Bottling Company, as the then Debtor, in the District Court of the United States, Southern District of California, Central Division, in that certain proceeding entitled, "In the Matter of California Associated Products Co., a corporation, doing business as Yankee Doodle Root Beer Bottling Company, Debtor," No. 45137-BH. (Certified Transcript of record, p. 2.)

2. That on said date, to wit, July 29, 1947, an Approval and an Order of Reference was made by the said District Court, and the said matter was referred for all purposes to Referee Hugh L. Dickson. (Certified transcript, p. 13.)

3. That the Plan of Arrangement failed and that on April 20, 1948, the above mentioned debtor was adjudicated a bankrupt by an Order of the Referee filed on April 26, 1948.

4. That on June 21, 1949, Appellant filed with the Clerk of the District Court, and concurrently with the Notice of Appeal, a Bond for Costs on Appeal, in the sum of $250.00, and executed by Fireman's Fund Insurance Company as surety. (Certified transcript, p. 65.)

5. That Exhibits "1" and "2" may be photostated in lieu of printing the same.

6. That the matters referred to in points 1, 2, 3, and 4 may be used on this appeal in lieu of printing the documents to which they relate.

Dated this 16th day of September, 1949.

CHARLES J. KATZ,
By /s/ SAMUEL W. BLUM,
Attorneys for Appellant.
CRAIG, WELLER & LAUGHARN,
By /s/ THOMAS S. TOBIN,
Attorneys for E. A. Lynch.
/s/ AARON LEVINSON,
Appearing in Pro Per.
/s/ HUGH W. LUTZ,
Attorney for Victor Kramer.

/s/ JOHN E. WALTERS,
Attorney for Bank of America National Trust and Savings Association.

/s/ FRANK T. COTTER,
Attorney for F. W. Boltz Corporation.

/s/ MAURICE M. GOODSTEIN,
Attorney for Leo Brill.
Attorneys for Appellees.

[Endorsed]: Filed Oct. 12, 1949.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF PORTIONS OF RECORD TO BE PRINTED AND PHOTOSTATED.

To the Clerk of the Above Entitled Court, and to the Appellees and Petitioners for Review, Bank of America National Trust and Savings Association, Leo Brill, F. W. Boltz Corporation, a California Corporation, Victor Kramer, and Aaron Levinson, and to Their Respective Counsel of Record, and to E. A. Lynch, Receiver and Trustee in the Above Entitled Action, and to His Counsel of Record:

Comes Now The Appellant, Wil-Rud Corporation, and hereby designates the portions of the record requested by appellant to be printed and photostated, to wit:

A. Portions of the Record to Be Printed as Requested by Appellant:

1. Stipulation in Lieu of Printing Portions of Record, dated September 16, 1949.

2. Transcript of the evidence of the hearing on October 15, 1947, before Referee Hugh L. Dickson.

3. Petition for Order to Show Cause re Wil-Rud Corporation, filed October 31, 1947.

4. The Order to Show Cause issued on October 31, 1947, by Referee Hugh L. Dickson on the aforementioned petition designated under No. 3 hereof, requiring the Wil-Rud Corporation to appear on November 7, 1947.

5. Transcript of the evidence of the hearing held before Referee Hugh L. Dickson on November 7, 1947.

6. Petition for Leave to Compromise re Wil-Rud Corporation Sale, dated December 26, 1947, and filed on or about January 6, 1948.

7. Notice of Hearing on Petition to Compromise and Sale of Assets Receivable, dated January 14, 1948.

8. Findings of Fact, Conclusions of Law and Order Approving Petition for Leave to Compromise re Wil-Rud Corporation sale, signed by Referee Hugh L. Dickson on February 26, 1948.

9. Transcript of the evidence on the hearing re petition for compromise held on January 29, 1948, before Referee Hugh L. Dickson.

10. Petition for Review of Referee's order dated

February 26, 1948, filed by petitioners, Aaron Levinson, Bank of America National Trust and Savings Association, Leo Brill, F. W. Boltz Corporation, a California corporation, and Victor Kramer.

11. Referee's Certificate on Review, dated March 24, 1948, re the petition of the aforesaid creditors to review order of February 26, 1948.

12. The Memorandum Opinion of Federal District Judge Ben Harrison reversing the order of the Referee on the Petition for Review of Aaron Levinson, Bank of America, Leo Brill, F. W. Boltz Corporation and Victor Kramer.

13. Minute Order of Federal District Judge Ben Harrison, dated on or about December 16, 1948, reversing the order of the Referee on the Petition for Review of Aaron Levinson, Bank of America, Leo Brill, F. W. Boltz, and Victor Kramer.

14. Findings of Fact and Conclusions of Law and Order granting Petition for Review and reversing Order of Referee Approving Compromise, signed by District Judge Ben Harrison and entered on or about May 26, 1949, in Judgment Book 58, page 475.

15. Notice of Appeal filed by Wil-Rud Corporation on or about June 21, 1949.

16. The order of Referee Hugh L. Dickson entered on October 22, 1947, confirming and approving sale to Wil-Rud Corporation, a corporation.

17. Statement of Appellant's Points Intended to Be Relied Upon on Appeal.

B. Portions of the Record to Be Photostated As Requested by Appellant.

1. Petitioners' Exhibit No. 1, being Itemization of Inventory Shortages.

2. Petitioners Exhibit No. 2, being Inventory of Assets.

Dated this 7 day of October, 1949.

Respectfully submitted,
CHARLES KATZ,
By /s/ SAMUEL W. BLUM,
Attorneys for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Oct. 12, 1949.

At a Stated Term, to wit: The October Term 1949, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Wednesday the second day of November in the year of our Lord one thousand nine hundred and forty-nine.

Present: Honorable Willian Healy,
Circuit Judge, Presiding,
Honorable Homer T. Bone,
Circuit Judge,
Honorable Walter L. Pope,
Circuit Judge.

[Title of Cause.]

ORDER THAT EXHIBIT 2 NEED NOT BE PRINTED

Good cause therefor appearing, It Is Ordered that Petitioner's Exhibit 2, Inventory of Assets, a ninety-four page itemization, need not be reproduced in the printed transcript of record but will be considered by the court in its original form.